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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From the United States District Court for the District of Arizona

Brief of American Newspaper Publishers Association as Amicus Curiae

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Brief of American Newspaper Publishers Association as Amicus Curiae

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INTEREST OF AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a nonprofit membership corporation of daily newspapers organized under the laws of the State of New York. Its membership consists of more than 1,000 daily newspapers whose publications repre-

sent more than 90 percent of the total daily and Sunday circulation of newspapers published in the United States.

The Association concerns itself with matters of general significance to the daily newspaper publishing business and to the profession of journalism. It acts as a clearing house of information for its membership by disseminating bulletins and research reports on all significant phases of the daily newspaper business. The ANPA Research Institute, incorporated in 1954, is now the main source of research and reports on mechanical and technological aspects of the printing and production of the modern daily newspaper.[1]

This Amicus speaks in behalf of two groups in its membership as set forth below.

INTEREST OF ANPA MEMBER NEWSPAPERS PUBLISHING UNDER OPERATING AGREEMENTS

Forty-four member newspapers of this Association, including the appellants, located in twenty-two cities in various parts of this country and operating under similar agreements, have a direct and vital interest in the resolution by this Court of the legal and factual issues raised by the District Court's illegal *per se* ruling under Section 1 of the Sherman Act and on which the court below granted summary judgment. Presented infra are the salient provisions of the operating agreement in this case and the substance of the matters here in issue of grave consequence to these forty-four daily newspaper publications.

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[1] The consent of the parties to the filing of this Brief has been filed with the Clerk of the Court.

INTEREST OF OTHER ANPA MEMBERS

If the illegal *per se* ruling of the District Court is allowed to stand, apart from the direct and immediate adverse consequences to daily newspapers now operating under joint operating agreements, an affirmance by this Court will abort future reliance by any failing daily newspaper upon a like operating agreement with another financially sound daily newspaper in the same city. This will further doom a realistic and reasonable mode of counteracting, for the benefit of the public, the trend toward virtual extinction of two separately-owned daily papers in a given city otherwise economically unable to sustain them.

Further, the banning under the Sherman Act of such joint operating agreements arising from a failing daily newspaper situation, brings into purview the alternatives to the operating agreement. One such alternative is a complete merger under single ownership of the two daily papers in the city in question. The other is the demise of the failing daily paper and a resulting sole daily newspaper in that city.

Given the predicate of a failing newspaper, neither of these alternatives would be in violation of either the Sherman Act or Section 7 of the Clayton Act when judged by the natural and implacable economic forces, hereinafter analyzed, which justify the complete merger or account for the sole daily newspaper—the so-called "monopoly thrust upon" the remaining financially sound daily newspaper.

Lawful as these alternatives would be, it cannot be gainsaid that sustaining the legality of joint operating business agreements between two daily newspapers,

arising from the failing condition of one of them, keeps alive an option for newspaper publishers who have a mutual concern in fostering the continuance in the city of two separately owned and independent sources of news, features and editorial voices. Surely that primary purpose is compatible with the public interest intended to be served by both the antitrust laws and the First Amendment.

GENERAL STATEMENT AS TO THE OPINION BELOW, JURISDICTION, STATUTES INVOLVED AND THE FACTS

The Amicus adopts the statement of these matters as set forth in the Appellants' Brief.

QUESTIONS PRESENTED

The questions presented by this appeal as viewed by this Amicus are:

1. Do inherent differences exist between the daily newspaper publishing business and other businesses and industries requiring the application of a Rule of Reason accommodation of business competition under antitrust policy to political and social values of competition and diversity of editorial voices?

2. Were there disputed legal and factual issues of a novel nature involving a failing daily newspaper in a city unable economically to support two daily newspapers in full commercial competition which should have precluded the District Court from summary treatment of the case?

3. Is an operating agreement merging only the business operations of the Star and Citizen into a single business enterprise, Tucson Newspaper, Inc. (TNI), while maintaining the corporate entities of the Star

and Citizen for editorial purposes, illegal under the Sherman Act when a total merger under the circumstances of this case would be legal?

SUMMARY OF ARGUMENT

This is an antitrust case of first impression. This Court has never had brought before it a case involving disputed legal and factual issues as to the application of Section 1 of the Sherman Act relative to the survival of failing daily newspapers in full commercial competition. Here we have the employment of an operating agreement resulting in a partial merger or partial joint venture to enable the failing newspaper to survive. This further resulted in the business operations of two newspapers being merged into a third corporation, Tucson Newspapers, Inc. (TNI), with the continuation of two separate corporate entities encompassing the editorial functions of the two newspapers, namely, the Star and Citizen. Thus is presented the novel question which should be resolved by this Court in a fashion designed to fulfill the goal of dissemination of that diversity in ideas envisioned by the First Amendment. The uniqueness of the two level functions, which makes consolidation of business operations in the newspaper business reasonably ancillary to the noncommercial main end of preserving competition in editorial functions of daily newspapers, is of such importance to the people of our country that it should be resolved by this Court as being non-violative of the Sherman Act.

In all prior antitrust cases decided by this Court, the Court applied illegal *per se* rules under Section 1 of the Sherman Act only to situations where there

was a contract, agreement, combination or conspiracy *having no other purpose than the sole one of suppressing competition.*

The Court should apply a Rule of Reason accommodation of economic values of competition under antitrust policy to the political and social values of competition in diversity of editorial voices. No prior case before this Court has ever called for this balancing of interests involving the preservation of a failing daily newspaper. In the several antitrust press cases decided by this Court in the past, different issues were involved.[2] In this case, only a Rule of Reason approach can ascertain the relevant facts peculiar to the daily newspaper publishing business and the circumstances surrounding the 1940 operating agreement which has the redeeming primary virtue of sustaining news and editorial rivalry between the Star and Citizen.

In order to understand this case, the Court must have a grasp of the historic daily newspaper press

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[2] *Associated Press* v. *United States,* 326 U.S. 1 (1945); *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594 (1953); and *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951); *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968).

Associated Press, supra, cited by the Government, is far afield from the facts of this case. There the Court held that an AP by-law was on its face in purpose and effect a group boycott by AP members against competitor applicants for AP membership by means of onerous requirements not imposed on non-competing applicants. Summary judgment was accordingly affirmed.

This was held to constitute a combination in unreasonable restraint of access to AP news reports.

On that basis the AP by-law was struck down as incompatible with the performance of a basic function of daily newspapers as a news medium. It was held an unreasonable restraint on access to the highly valued and essential AP news reports and offensive to a constitutionally guaranteed untrammelled press.

functions of relevance here. It is important to note that conventional economic analysis designed to explain the structure and behavior of industrial firms must be modified to conform to the realities of the daily newspaper publishing business.

In comprehensive terms, daily newspapers, the oldest medium of mass communication in our country, perform the service of information dissemination. That information is divided into news—information of current interest to the public; features (comics, TV and radio guides, stock market reports, and the like); editorial views (including opinions of columnists and other ideas); and advertising. Unlike national industrial commodity markets, daily newspapers are essentially local businesses embodying a pervasive immediacy.[3]

The indispensable role of an independent daily newspaper in the political and social life of our democratic society in performing the above functions has repeatedly been articulated by this Court.[4]

Two Pivotal Facts

While a daily newspaper packages in each issue its services in news, features, opinions and advertising,

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[3] See Time Perishability of Daily Newspapers, infra.

[4] This Court has aptly summarized this vital role in *Times-Picayune* supra at 602-603:

> "• • • A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society • • •. By interpreting to the citizen and vigilantly scrutinizing the official conduct of those who administer the state, an independent press stimulates free discussion and focuses public opinion on issues and officials as a potent check on arbitrary action or abuse . . . ."

this Court realistically recognized in *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, at 604 (1953), that

> "Advertising is the economic mainstay of the newspaper business * * *. Obviously, newspapers must sell advertising to survive. * * * "

One pivotal fact, therefore, is that the continued publication of a newspaper as a profitable enterprise depends preponderantly on its advertising revenues.

Another stark reality recognized by this Court in *Times-Picayune* (*supra* at 603) is that

> * * * daily newspaper competition within individual cities has grown nearly extinct * * *.

This generalization is more true empirically today than when this Court so stated in 1953. See *infra,* Point I.

There is another pivotal fact of relevance to the case at bar. Neither in 1940, when the operating agreement was made, nor today, can the metropolitan Tucson market economically support two separately owned and fully competing newspapers. Accordingly, the 1940 operating agreement is a reasonable means adjunct to the salvaging of the failing Citizen and the chief purpose of preserving competition in independent sources of news, features, and editorial comment.

This brings into view the previously mentioned two-level functions as a unique characteristic of the daily newspaper business.

On one level, the commercial operations are aimed at promoting circulation, which in turn is interlocked with the promotion of advertising patronage, the lifeblood of the daily newspaper.

On the other level, the competition in dissemination of news, features, and editorial opinions and other ideas—the journalistic press functions—renders services distinct from the commercial functions.

These press functions promote diversity—"a multitude of tongues"[5]—which is the goal fostered by the First Amendment. On this level of functions, the individuality of every daily newspaper stems from differentiations in its news coverage and editorial viewpoint.

Salient Undisputed and Disputed Facts

It is undisputed that the 1940 agreement fully preserves two separate and independently-operated news and editorial departments of the Star and Citizen, respectively, in vigorous, journalistic competition with each other. It is also undisputed that each paper retains its corporate entity and trade name so that it can be readily identified by its readers. There is also no dispute that the 1940 operating agreement, through Tucson Newspapers, Incorporated (TNI), consolidates or merges *only* the mechanical, circulation, advertising and other business functions of the Star and Citizen.

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[5] It is the level of the daily newspaper's journalistic functions to which Judge Hand referred in his *Associated Press* opinion, 52 F. Supp. 362 at 372 (S.D. N.Y. 1943), a quotation this Court repeated in its *Times-Picayune* opinion at 603:

> "• • • The press, in fact, 'serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all • • •.'"

But the appellants rightly dispute the District Court's clearly erroneous Finding 17, that, as of 1940, Citizen was not in a failing condition. This is one major controverted question. This Court must determine whether that is a clearly erroneous finding as well as considering the need for clarification of the legal and factual criteria governing the test applicable to the failing company defense under the Sherman Act.

Another crucial disputed fact is whether Tucson—and other cities where similar operating agreements are in force—can economically support two fully commercially competing daily papers. This factual issue was also preemptorily pushed aside by the District Court's summary ruling under Section 1 of the Sherman Act.

ARGUMENT

I.

THE DISTRICT COURT SHOULD HAVE CONSIDERED THE UNIQUE STRUCTURAL AND BEHAVIORAL CHARACTERISTICS OF THE DAILY NEWSPAPER PUBLISHING BUSINESS BY A RULE OF REASON APPROACH TO THE SECTION 1, SHERMAN ACT ISSUES IN THIS CASE.

Here is presented an economic analysis of selected characteristics of the daily newspaper publishing business of direct relevance to this case. In the broad spectrum of that business there are other phases of general interest but they are outside the ambit of the issues and record pertinent to this case.

Daily Newspapers Are Not Like Industrial Products

A meaningful and realistic accommodation of antitrust policy to the functions of the daily newspaper press cannot be made without an understanding of the nature of a daily newspaper.

Confusion of basic concepts arises from labeling newspaper publishing as an "industry". A newspaper is not a manufactured commodity.[6] It is not sold and purchased for its physical embodiments in paper, ink and type. Describing it as a "product" is inapt. A newspaper is a package of services in a printed medium which disseminates information—news, features, opinions, and advertising.

Pricing of a daily newspaper is a clear example of the inapplicability of the economic theory of pricing of industrial products. The newsstand and home delivery subscriber revenues of a daily newspaper cover only a minimal percentage of the total costs of the newspaper. Adding a markup to cost to make a profit on each copy of newsstand and home subscriber newspaper obviously is out of the question. In contrast to industrial enterprises, a daily newspaper must depend on advertising revenues to cover total costs and to ensure a profit.

As Justice Frankfurter succinctly stated in *Associated Press* v. *United States,* 326 U.S. 1 at 28 (1945):

> "* * * A free press is indispensable to the working of our democratic society. The business of the press * * * is the promotion of truth regarding public matters by furnishing a basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. * * *"

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[6] The judicial lineage of this view is attested by *In re Capital Publishing Co.,* 3 MacArthur 405 (D. Col. 1877). For recent descriptions to the same effect, see *Casey* v. *Male,* 72 N.J. Super. 288 (1962); *Advertiser Publishing Co.* v. *Fase,* 279 F. 2d 636 (9th Cir. 1960).

It is fair to say that the preservation of a failing newspaper in a city is a matter of greater public concern than the shutting down of one industrial firm in an industry where there are various producers of nationally distributed commodities. If one manufacturer fails, the public can readily turn to a choice among other manufacturers of the commodity.

There is no dispute that publishers of newspapers are engaged in private enterprise for profit. But it is equally beyond dispute that publishers are entrusted with the performance of functions having a public interest quite different from industrial enterprises.

In cities with a morning and evening daily, readers do not regard the differences between them as "Tweedledum" and "Tweedledee." Their circulation and advertising volume may be disparate for a variety of reasons but the two papers are not regarded as Siamese twins in make-up and content. Some readers may buy only the morning or only the evening paper and some buy both. The latter obviously do not feel they are purchasing the same "product" twice a day as would be true in purchasing two identical industrial commodities.

Time Perishability of Daily Newspapers

A daily newspaper is unique in the fleeting time its news and its local retail and classified advertising information remain "hot" or "current". This at times is also true regarding editorial opinions.

Each weekday (and Sunday, if the paper publishes then) has its built-in deadline. The daily package of services of the paper must be redesigned, so to speak, as to content and space allocation for news, features

and editorial comments—the so-called "newshole". The local advertising information also involves a day by day deadline for printing offerings in goods and services and their changed prices, including bargain sales. Unlike industrial commodities, there is no inventory to be stored for later sale. In sum, the bulk of a daily newspaper is perishable with respect to its mainstay in editorial and advertising content. The fact that certain news and feature columns may have less perishable aspects is only of concern for those who search the newspaper's archives. Further, since the newspaper is essentially a local service, the sales are restricted to a single market area.

The extra costs and burdens of the daily press runs are too obvious to require more than their statement.

A morning daily must be delivered to home subscribers before the conventional breakfast hour and it must be on the newsstands before people go to work. The evening paper likewise must be on the newsstands before the evening rush hours and delivered to homes before dinner. In no other private business are there the extra efforts and costs inherent in the daily newspaper business.

In sum, the time perishability deadlines and daily press runs add extra costs, burdens and risks of a unique character to the publication of a daily newspaper.

Peculiar Structural Characteristics of Daily Newspaper Business Relevant to This Case

Trend Toward Virtual Disappearance of Two Separately Owned and Commercially Competing City Daily Newspapers

This is the salient fact of relevance to this case, and one that applies to city dailies generally.

This Court recognized this fact in *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594 at 603 (1953):

> "* * * daily newspaper competition within individual cities has grown nearly extinct. * * *"

This fact is even more irrefutable today than in 1953 when this Court first stated it. Attached to this Brief are Tables with empirical data supporting that fact.[7]

The economic analysis that follows will show that this trend is attributable to natural economic forces, not artificial barriers. The stark reality is that nearly all cities simply cannot economically support two commercially competing dailies rendering the full newspaper service to the public.

Total Number of City Dailies Placed in Context

The total number of daily newspapers has been remarkably stable with only slight fluctuations since 1945. On January 1, 1968, the total number of dailies was 1,749, virtually the same as January 1, 1946.[8] In part this stability is explained by the establishment of suburban daily papers since the phenomenal growth of the suburbs after World War II and in part also

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[7] See Appendix II, Tables A and B.

[8] See Appendix II, Table A.

by the entry of some new dailies in fast growing smaller cities.[9]

These total figures, however, do not aid in illuminating the particular facts of an antitrust case such as the present one involving city dailies. Economic analysis of a daily newspaper must be placed in the context of the essentially local market a newspaper serves. Care must be taken to consider the differentiations of a city daily when compared to a suburban daily. This is not intended to underrate the importance of the suburban daily newspapers. ANPA membership consists of daily papers of all sizes and circulations and the Association performs its services for all of its members. It cannot be gainsaid, however, that the boundaries of the factual and legal issues in this case are limited to city newspapers and a failing newspaper situation.

Vanishing Competing City Daily Newspapers

With the foregoing as the focus, we first turn to empirical data in the Tables in Appendix II[10] pertaining to the virtual vanishing of commercially competitive city dailies.

Table A shows that today 85.6 percent of 1,500 cities, namely 1,284 cities, have only one daily. Adding to the single city dailies the 150 cities with two dailies under common ownership, and 22 cities with two daily

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[9] See Growth of Suburban Daily Press, infra and Appendix II, Table C.

[10] These Tables were prepared for this Brief by Professor Raymond B. Nixon of the School of Journalism, University of Minnesota, from the *Editor and Publisher International Year Book,* 1930-1968. Professor Nixon has made a continuing study of newspaper publishing trends since 1945.

newspapefs under joint operating agreements, 97 percent of the cities have no *commercially* competing dailies published in those cities.

Table A also reveals that the 45 cities with two or more commercially competing dailies published therein on January 1, 1968, amounted to three percent of the total of 1,500 cities. The Table shows the steady decline of competing city dailies with a material percentage decrease beginning in the 1930's when radio first became a serious competitor.

Table B classifies cities with commercially competing dailies by population groups from 1945 to 1968. As of today only 45 of the 1,500 daily newspaper cities have competing dailies, and of these 45 only three cities have more than two ownerships of daily newspapers of general content and circulation.

Before proceeding with other empirical data, it is important to state at this point a general conclusion that emerges and is supported by both economic analysis and statistical data with respect particularly to city dailies. This is that the actual demise of many of these dailies, and the failing condition which threatens the extinction of others, have arisen, and will continue to arise, from implacable economic forces which do not permit those metropolitan areas to support two commercially competing dailies.

Those inexorable economic factors also account for the rarity of new successful entries into the field.

Table C reveals that new dailies in cities of 100,000 or more have been established in most years from 1930 through 1967 but most of them have been in the smaller cities. The true picture of the trend, however, appears only when it is kept in mind that, as Table C also shows,

with few exceptions, the new entries of competing dailies in these cities ended with suspension, merger or conversion to a weekly paper. Table D lists each of the dailies of general circulation (in cities of 100,000 or more) which have suspended, merged or changed to weekly.

The net effect shown in the above Tables is that successful new entries of daily city papers have been rare and with one exception, the Oklahoma Journal established in 1964 in Oklahoma City, there has been no successful new daily of general content and circulation in any city of the United States of more than 200,000 population since 1941. Such facts must be startling to persons not familiar with the daily newspaper publishing business.

Other striking facts emerge when a statistical analysis is made concerning the relation between the population of cities and the number of daily newspapers a city of a given size can economically support. It appears that today a population of more than 650,000 is required to assure support of two or more independent commercially competing dailies.[11] This, of

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[11] See Nixon, *Trends in U.S. Newspaper Ownership: Concentration With Competition,* 14 Gazette, No. 3, 181 at 185 (1968) (International Journal of the Science of the Press, University of Amsterdam, Holland).

This publication potential was also arrived at from an empirical study by Professor Richard J. Barber in *Newspaper Monopoly in New Orleans; The Lessons for Antitrust Policy,* 24 Louisiana L. Rev. 503 at 543 (1964). He stressed, however, that in addition to publication, account must be taken of the division of circulation between two rival dailies. He said at 542: "If one publisher gains a sufficiently large lead in circulation, the underlying economics of the situation normally cause so marked a diversion of advertising to the stronger paper that the other's life blood, advertising revenue, is choked off."

course, does not exclude particular variations in conditions which do not fit into this population potential. No mathematically precise line can be drawn to cover every case. A city of more than 650,000 may have single ownership of a morning and evening paper or may justify a joint operating agreement. But the 650,000 population figure is a realistic one today.

Unlike industrial commodity industries, the economic potential in increase of population in a given city does not create in proportion a potential increase in daily newspaper circulation and volume demand for newspaper advertising from which the bulk of the newspaper's revenues comes. Accordingly, even a great increase in the population of a given city does not assure a shift from a single daily paper to two competitive dailies. A plurality of cost factors, indicated below, also must be considered along with the economic potential of the city's population.

The relevance of the foregoing salient structural economic characteristics of the daily newspaper publishing business is now readily discerned. The inherent natural forces beyond the control of any individual publisher create situations, like that in the instant case and the other cities where the consummation of an operating agreement has been the means of preventing the death of a failing newspaper, while at the same time achieving the primary objective of keeping alive viable competition in news, features and editorial views with the other daily paper.

It would be paradoxical and contrary to the public interest to deprive the readers of a community of this diversity by interpreting the antitrust laws as a Congressional mandate to compel two daily papers to re-

vert to a competitive situation which was the proximate cause of the failing condition of one of the papers at the time the agreement was made. Yet the decree of the District Court, requiring appellants to modify the operating agreement to eliminate the consolidation of the circulation and advertising departments of the Star and the Citizen, and the division of revenues between them, will operate to restore the very conditions that caused the Citizen to deteriorate into a failing condition.

Growth of Suburban Daily Press

The structure of the daily newspaper business also requires consideration of the phenomenal rise of new dailies in the suburbs. Suburban dailies differ from core city dailies in their content and appeal. A suburban paper caters to the local market it serves. Its coverage provides local news and advertising of the community where its readers live.

The competition of suburban dailies is a factor of relevance in cities surrounded by suburbia and has relevance for some of the cities with operating agreements like the one in the instant case. A recent study by James Force of *The Daily Press in Suburbia: Trends in 15 Metropolitan Areas*[12] compares circulation trends for suburban dailies with those of central city dailies for the years 1946-1961. Mr. Force concluded:

> "Over the 15-year period studied, the suburban circulation figure increased by 86.6%, while the metropolitans were losing over half a million read-

[12] 39 Journalism Quarterly 457 (Autumn, 1962).

ers all told—a drop of 2.6%. And this was happening while the total central city population went up 9.7% from 1940 to 1960."

Mr. Force further found that

> "* * * The percentage gain for the average central city daily over this time span [1946-1961] was 24.6%.
>
> "In comparison, the average circulation for the suburban daily has increased 72.6%, even though the number of suburban dailies has increased [from 134 in 1946 to 145 in 1961]."

The Amicus calls attention to this structural development only to point out that the entry of a new suburban daily meets a separate need but does not fill the gap left by a failing central city daily which suspends publication. The point is that no matter how attractive a suburban daily may be, it differs from the core city daily, and, to the extent that many suburban residents may prefer only their local suburban daily, the increase in circulation of that suburban daily diverts both circulation and advertising revenues from the inner city daily.

No Artificial Barriers to Entry

The conventional economic analysis of barriers to entry into industrial commodity markets requires significant qualifications to make that theory relevant to the realities regarding opportunity for successful entry of a new city daily newspaper.

The empirical data on entries and exits of daily papers in Tables B, C, D mirror the actualities. New daily newspapers have indeed been launched in numer-

ous cities. But the salient fact is that a minimal number have survived. As previously stated, with the exception of the Oklahoma Journal in Oklahoma City, no new city daily has made a successful entry in a city of more than 200,000 since 1941.

What accounts for this? The answer attested by lessons of experience is that natural barriers—not barriers artificially contrived by the owner of a daily newspaper already in the market—account for the rare successful entries of new city dailies. The failure of such potential competition to emerge stems from the lack of sufficient large volume local retail advertising, coupled with the high costs of labor, equipment and newsprint. These impersonal forces explain why the local market cannot sustain economically two commercially competing and independently owned city daily newspapers.

The resulting pattern of market behavior, attributable to a downward spiral in circulation and advertising revenues of a failing city daily, concurrent with an upswing in circulation and advertising revenues for the competing financially sound daily newspaper is analyzed below. This behavioral characteristic inheres in the natural forces that operate when the local retail advertisers turn to one of the two dailies.

What, then, is the prospect of a new entry when one of the two city dailies goes into a tailspin toward failure? Experienced newspaper publishers have no delusions about acquiring and rehabilitating such a failing newspaper. High speculative risks are involved in any attempts to divert circulation and volume advertising from the well established successful paper. This is a natural deterrent. No matter how great the

total resources of the owner, a city daily must operate in its own local market and must stand on its own financial feet. A newspaper publisher of today does not deliberately set out to subsidize a failing daily newspaper as might a manufacturer of a nationally distributed commodity, who, for a time, might subsidize a failing unit of his national enterprise. The fate of a local city daily is inextricably bound to its locale by a complex of factors unlike those faced by a seller of wares. A newspaper's image for attraction of readership circulation, upon which the lifeblood advertising revenues depend, is created by appeals far different from product differentiations of sellers of brand name commodities.

Intermedia Mass Communication Competition

From a structural standpoint, irrespective of how one might define the "relevant product market" with respect to that technical question in a Section 2, Sherman Act case or a Section 7, Clayton Act merger case, it is an inescapable reality that city newspapers do face vigorous competition from other commercial media for news, information and advertising. Leaving aside controversial antitrust legal criteria, there is little doubt that the general public and businessmen in their daily observation and experience recognize the diversity of intermedia sources.

It makes no more sense to consider newspapers alone as part of the competition picture in the field of mass communication than to consider railroads alone in the mass transportation industry.

This common sense and realistic understanding obviously drifts into legal complexities when the usually

disputed antitrust question of what constitutes the "relevant product market" arises.

We recognize the ramifications of the numerous merger cases recently decided by this Court in which determination of the "relevant product market" has required consideration of whether or not the reasonable interchangeable substitute products test applies as set forth originally in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) and amplified in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), to include a broad market or a well-defined submarket.[18]

We do not purport to discuss the legal involvements of the controversial market definition issue. We merely stress that this Court has not had occasion to adjudicate the question whether daily newspapers compete with other mass communicators of ideas in a given relevant market, whether in a Section 1 or Section 7 case. We do think that regardless of how that question is ultimately resolved by this Court, market behavior in the daily newspaper business cannot be analyzed without recognition that daily newspapers in fact do compete with other mass media. We submit that this intermedia competition should therefore be judicially recognized to the extent that *in fact it does exist*. Whether this meets the Court's test of reasonable interchangeability or reasonable cross-elasticity of demand is a factual question for case by case adjudication.

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[18] Intermedia competition was judicially recognized in the Findings of Fact in the *News Inc.* v. *Lindsay Newspapers, Inc.*, CCH 1962 Trade Cases para. 70,398 (D. Fla. 1962).

With that caveat in mind, it is obvious that in a given city the radio and television stations in fact compete with the daily newspaper in news and advertising. Of course, no one of these is a perfect substitute for the other. But in spite of the differences among them and the partial market overlappings, they are clearly competing news media. The joint service nature of a newspaper's news and advertising makes it equally clear that they also compete in the advertising market.[14] Then intensity and extent of competition between any two of these media may vary as well as the effectiveness of that competition. Those are factual questions for resolution in each particular case.

In sum, the structure and behavior of the daily newspaper market become meaningful only when, as this Court said in *Brown Shoe, supra,* market boundaries are drawn to include competing products (or services in newspaper cases) and "to recognize competition where, in fact, competition exists". (370 U.S. at 326)

We submit that the growing competition from radio and television is a salient factor when analyzing the reasons for the extinction of locally competing daily newspapers. It is noteworthy that the percentage of cities with more than one daily newspaper dropped markedly in the 1920's and 1930's following the advent of radio, and in the 1950's following the lifting of a ceiling "freeze" on new television stations. The crucial factor is that there has been steadily increasing

[14] The competition of other media in advertising is revealed in the following percentages for 1967: newspapers, 36 percent; television, 21 percent; direct mail, 19 percent; magazines, 9 percent; radio, 8 percent; business press, 5 percent; outdoor, 2 percent. Source: Advertising Age, April 4, 1968.

competition for the time of the newspaper reader, the radio listener and the television viewer, and for the allocation of advertising dollars among these media.

The recent prolonged strikes against metropolitan dailies in cities such as New York, Detroit and Minneapolis, further confirm the reality of interchangeability between the daily newspaper, radio and television. During those strikes, the broadcast media and suburban press expanded their services to fill the breach caused by the absence of the city daily. The newspaper strikes dramatically demonstrated the extent to which a city's economic life is dependent upon publication of its daily newspaper.

Peculiar Behavioral Characteristics of Daily Newspaper Business Relevant to This Case

Market Behavior and Effects Stemming From Downward Spiral in Circulation and Advertising Revenues of One of Two City Dailies

As in our analysis of the peculiar structural characteristics of the daily newspaper publishing business, so here too, it is noted that an understanding of the behavior pattern in that business also requires modification of conventional economic theory applied to industrial commodity markets.

A chief unique behavioral characteristic of a city daily newspaper market arises from changes, upward or downward, in the circulation and advertising revenues of one of the two dailies—a two daily market being the one relevant to this case.

It is further noted that, as this Court stated in *Times-Picayune, supra,* "Advertising is the economic mainstay of the newspaper business".

Indeed, advertising revenue is the lifeblood of a daily newspaper.

From 70 to 75 percent of the revenue of a daily newspaper is derived from advertising of which the bulk is local retail display advertising (see Note 15, *infra*). The other two sources are from national advertisers of goods or services distributed through local outlets and classified advertising.

In a two daily city, a crucial factor accounting for a decline in the financial condition of one of the papers is disparity in circulation and the normally related disparity in advertising revenues between the two papers. In the daily newspaper business this is aptly described as the downward spiral suffered by one of the two papers or the upward swing gains for the other paper.

Finding 68 of the District Court reveals recognition of this behavioral feature as follows:

"The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect

newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation."

It is ironic that the District Judge's *per se* ruling under Section 1 of the Sherman Act is at odds with his Finding 68. For in Tucson and other cities where operating agreements have been made, it is precisely this downward or upward spiraling affect which is the prime threat to the demise of the less successful paper. Once the latter paper reaches a failing condition, the operating agreement becomes the means of assuring the community of the continuation of the two quality daily papers as independent rivals in the scope and depth of news coverage, features and editorial opinions.

This behavioral tendency is accentuated by the custom and usage among national advertisers and local retail advertisers to purchase advertising space in local daily newspapers by appraisal of the value of the newspaper as a medium for promoting demand for the advertised products or services. Circulation volume generally establishes the value of the paper to the advertiser but reciprocally the attractiveness value of the newspaper *per se* must exist before advertising value is created. In sum, large volume circulation and the size of the paper are the magnets for attracting advertising patronage.

The behavioral tendency depicted in Finding 68, supra, is supported by the experience of daily newspapers generally. A decline in the circulation of one daily relative to its rival daily sounds an early warning danger signal. The typical inevitable causal effect is

a decline in advertising revenue and this is the budding of a failing condition for the disadvantaged paper which leads to its death.

Economies of Scale of Single Plant for Two City Dailies Under Operating Agreement and Relation to Circulation and Advertising

This section is pertinent both to structure and behavior.

There is consensus that daily newspapers achieve economies of scale. This applies to the single plant for two city dailies under common ownership and to a single plant for two city dailies under an operating agreement essential to the financial survival of one of the papers which would otherwise revert to a failing condition.

The city daily with an expanding circulation generally attracts more advertising of which local retail advertising is the major revenue producer.[15] A page of local retail advertising tends to be of greater value to the advertiser as the number of readers increases. Reciprocally, the readers who buy the paper tend to

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[15] It has been estimated that advertising produces 75% of the income of the average newspaper. Editor and Publisher, April 6, 1963 at 15. The milline rate for advertising is adjusted to circulation.

In percentages based on the total advertising revenues of newspapers in the United States for 1967, it is estimated that 56 percent came from local retail advertising, 27 percent from classified advertising and 17 percent from national advertising. The estimate for national advertising was derived from the ANPA Bureau of Advertising records and those of Media Records. The standard source of estimate of classified advertising is MacDonald Classified Service, Lafayette, Indiana.

The estimate for retail advertising is a residual figure, using the division of linage between classified and retail as a guide.

be attracted to the paper, not only by editorial and news content, but also by local retail advertising. The two tend to react reciprocally. Given certain advertising rates, the greater the amount of advertising space sold, the greater the circulation and the advertising revenues tend to be.

With this interrelation of circulation and advertising in mind, we now turn to a description of the cost factors and economies of scale generally applicable to a city daily newspaper.

On the production side, a court could readily take notice of the trend toward greatly increased costs of producing a city daily newspaper. This applies to the following (a) cost of equipment and needed replacements; (b) labor costs; (c) cost of newsprint and other raw materials (e.g., ink) for printing the paper; and (d) cost of features and picture services. Certain variable costs, such as newsprint and ink, increase with the paper's circulation.

It is apparent that economies of scale on the production side are generally greater when two daily papers in the same city are produced in one plant—whether under a joint operating agreement or when two city newspapers are under common ownership—than when each paper is produced in separate plants. The single plant can be operated on a 24-hour mechanical plant utilization with certain controls to offset the largely uncontrollable costs of newsprint and labor.

Recent studies shed new light on the importance of economies stemming from the advertising side.[16] Bear-

[16] Rosse, *Daily Newspapers, Monopolistic Competition, and Economies of Scale*, 57 Am. Econ. Rev. 522 (1967); *Ferguson, The Advertising Rate Structure in the Daily Newspaper Industry* (1963).

ing in mind that the largest revenue of the paper comes from advertising (see Note 15, *supra*), the economies in costs of preparing advertising copy are of high importance.

Once the advertisement is set in type, no further expense is involved for composition. If an advertiser chooses space in both the morning and evening newspaper, this saving in cost benefits not only the publisher but also the advertiser. The publisher can then offer a reasonable combined advertising rate and, in addition, a total circulation impact which gives the advertiser the lowest unit cost for the advertisement.

The foregoing underscores the essential nature of the merger of business functions in an entity such as TNI in the instant case. If these circulation and advertising business operations are separated and conducted in separate departments, the economies of scale from printing and delivery of the two papers alone would not suffice to save the weaker of the two dailies from slipping back to a failing condition.

The Amicus submits that the integration of the commercial operations of two city dailies in one plant—as in Tucson and the other cities where similar operating agreements are in effect—is an essential means of effectuating economies of scale reasonably ancillary to the main purpose of preserving two independent and competitive news and editorial departments. The separation of those two departments of each paper is, of course, a prerequisite to the overriding purpose of the entire operating agreement, namely, to give the community two diverse sources of news and opinions.

II.

RECOGNITION BY ANTITRUST DIVISION OF BASIC DIFFERENCES AS BETWEEN THE STRUCTURE AND BEHAVIOR OF THE DAILY NEWSPAPER PUBLISHING BUSINESS.

It is significant that Charles D. Mahaffie, Jr., Chief, General Litigation Section, Antitrust Division, and chief attorney in the instant Citizen case, specifically recognized in a recent article certain peculiar characteristics of the newspaper publishing business.[17] Yet the Antitrust Division inconsistently blotted them out in this case by persuading the District Court summarily to apply *per se* illegality rules to the Section 1, Sherman Act, issues instead of resort to a Rule of Reason ascertainment of those unique features.

After pointing out that "Antitrust enforcement can roughly be divided between behavioral and structural offenses", Mr. Mahaffie stated at 927:

> "* * * in the media business, in terms of structure, the subject of our greatest current concern is the newspaper industry, where the post-war period has seen a trend to the disappearance of major metropolitan newspapers and a consequent disappearance of direct, head to head, newspaper competition * * *."

Thus, Mahaffie recognized the basic structural peculiarity we have already stressed and one this Court recognized in *Times-Picayune, supra.*

It is ironic that Mahaffie, in his argument before the District Court, did not have such great concern about

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[17] *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries* XIII Antitrust Bulletin, Fall, 1968, 927. This article was written after the District Court rendered judgment against the defendants in the Citizen case here on appeal.

the disappearance of a metropolitan daily newspaper such as the Citizen, which will result from invalidating the essential provisions of the 1940 operating agreement.

He also discussed other peculiar features of newspapers as a mass medium of communication.

After stating that the technique of "merger analysis in the mass media field is basically no different from merger analysis in any other field," he added the qualification: "But in practice there are factors which make the media field rather unique." (at 931)

Another peculiarity is noted in the following:

"Unlike other industries, the great majority of news and advertising media in this country are essentially local, not national businesses. * * *" (at 931-932)[18]

Excluding a merger involving one of the national media, he continued:

> "* * * we, in our analysis, must focus on one or a number of wholly local markets * * *." (at 932)

Still another peculiarity noted by Mahaffie at 932 is "the fact that media have dual functions and have two wholly distinct classes of customers". Thus, a newspaper serves its readers "in one way and its advertisers in another". Therefore, he says, "This means that in finding the relevant market in a media merger we must look at the facts from two viewpoints * * *"— the reader and advertiser, in the case of newspapers.

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[18] Only the Wall Street Journal and the Christian Science Monitor, both of which have specialized appeal, are dailies with predominantly national circulation.

He concludes "and these viewpoints may be quite different." (at 932)

The unique features which he stresses are among those the appellants unsuccessfully sought to establish by proffers of evidence relevant to a Rule of Reason inquiry which the District Court erroneously precluded under Section 1. Since the whole tenor of the Mahaffie article is pitched on the theme of preserving newspaper competition, the Amicus cannot perceive how disregard in this case of the realities of the unique characteristics of the daily newspaper business can be squared with that avowed goal in a situation where a failing newspaper is rescued from extinction by an operating agreement such as the one in this case.

It bears repeating that in appraising the unique two-level functions in the daily newspaper business, the "direct, head to head" competition in news and editorial voices is a political and social value of First Amendment public interest greater than any diminution in commercial competition which may be attributable to the partial merger under the operating agreement peculiar to the daily newspaper publishing business. Stated another way, if the Court and Antitrust Division would admittedly approve a total merger of the corporate entities here involved, how can they not approve the merger of the commercial interests, leaving the editorial departments separate and distinct?

III.

THIS IS NOT AN APPROPRIATE CASE FOR APPLICATION OF SHERMAN ACT PER SE ILLEGALITY RULES AND THE DISTRICT COURT THEREFORE ERRED IN SUMMARILY EXCLUDING APPELLANTS' OFFERS OF EVIDENCE AND PROOF RELEVANT TO A RULE OF REASON RESOLUTION OF DISPUTED LEGAL AND FACTUAL ISSUES.

The Misconceived Threshold Issue

The Government and District Court misconceived the threshold Section 1 issue in this case.

By the verbalism of labels and catch-words, the 1940 operating agreement was unwarrantedly branded as illegal *per se* "price fixing," "profit pooling" and "market allocation" in violation of Section 1 of the Sherman Act.[19]

This automatic conclusion begs the question *in limine*—whether the consolidation of the commercial functions under the 1940 operating agreement involved a class of restraints such as those this Court has deemed

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[19] The danger of an erroneous classification of Sherman Act restraints is aptly summed up by Federal Trade Commissioner Philip Elman in *Petrified Opinions and Competitive Realities*, 66 Col. L. Rev. 625 at 627 (1966):

"'It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden * * *.'"

In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 at 178 (1965), the Court said: "* * * the area of *per se* illegality is carefully limited. * * *"

inherently by nature or character conclusively presumed to be illegal under Section 1 of the Sherman Act.

Rule of Reason Approach Appropriate for This Case Involving Failing Daily Newspaper

The thrust of the argument here is directed to the cardinal contention that the merger of solely commercial operations of the Star and Citizen under the 1940 agreement, as a means of preventing the demise of the failing Citizen, falls within the class of restraints whose validity depend upon ascertainment of facts peculiar to the daily newspaper business and relevant to the circumstances surrounding the agreement as of 1940, when it was consummated.

Those considerations were brushed aside by the Government and District Court on the erroneous premise that the restraints on the face of the operating agreement are governed by Sherman Act decisions of this Court condemning as illegal *per se* a contract, agreement, combination or conspiracy *with no other purpose than the stifling of competition.*[20]

We will show that, to the contrary, this case is an appropriate one for a Rule of Reason inquiry of which

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[20] The *per se* illegal Sherman Act cases cited by the Government in footnote 9 at 14 of its Motion to Affirm are factually distinguished in Appendix I of this Brief. The Government in its Motion to Affirm at 12 unwarrantedly states that "Appellants apparently do not challenge" the District Court's ruling under Section 1. This is wholly contrary to the record herein. Equally untenable is the Government's contention that Appellants seek to justify *per se* illegal violations by business necessity arising from the failing condition of the Citizen. The genuine issue, evaded by the Government, is whether the 1940 Operating Agreement is an unreasonable restraint of trade under Section 1.

the doctrine of ancillary restraints is an integral part, as this Court has recognized in landmark opinions.[21]

This Rule of Reason approach will reveal that the unification of the commercial businesses of the Star and Citizen under the operating agreement is reasonably ancillary to the overriding lawful purpose and redeeming virtue of maintaining competition in news, features and editorial comment, a rivalry in diversity of ideas harmonious with First Amendment goals.

Prejudicial Error of District Court

By rejecting appellant's offers of evidence and proof on Section 1 issues relevant to the Rule of Reason, the District Court committed prejudicial error in entering summary judgment under Section 1 of the Sherman Act.[22] This mistakenly eliminated consideration of a

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[21] *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911); *Chicago Board of Trade* v. *United States,* 246 U.S. 231 at 238 (1918). Recent opinions of this Court recognize the continued vitality of the Rule of Reason. *White Motor Co.* v. *United States,* 372 U.S. 253 at 261 (1963) (majority opinion of Justice Douglas and concurring opinion of Justice Brennan).

In *United States* v. *Columbia Pictures Corp.,* 189 F. Supp. 153 at 178-179 (S.D.N.Y. 1960), the court applied the ancillary restraints Rule of Reason doctrine, holding that an agreement between two motion picture distributing companies, Columbia and Universal, did not involve price fixing in violation of Section 1 of the Sherman Act.

[22] In its Motion to Affirm at 17, Note 14, the Government states that "Summary judgment is not a novel procedure in antitrust cases." That is true in the cases cited by the Government, namely, *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958) (discussed elsewhere in this Brief) and *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). In both cases the Court affirmed summary judgment where coercive tying clause agreements were found to have the sole purpose of suppressing competition in the tied products. But this Court has warned against

proper accommodation of antitrust policy and the maintenance of the journalistic functions of a free press.

IV.

ACCOMMODATION OF ANTITRUST POLICY TO MAINTENANCE OF COMPETITION BETWEEN TWO DAILY NEWSPAPERS IN A CITY IN THE PERFORMANCE OF THE BASIC PRESS FUNCTIONS IN DISSEMINATION OF NEWS AND EDITORIAL VIEWS IS THE HEART OF THIS CASE OF FIRST IMPRESSION.

In the Summary of Argument we pointed out that the type of operating agreement herein merges, through Tucson Newspapers, Incorporated (TNI), the commercial management and operation of the mechanical, printing, circulation, advertising departments of the Star and Citizen and other business functions. Each newspaper, however, as provided in the agreement, retains its separate corporate identity and *the news and editorial departments of each remain separate and independent.*

This is a case of first impression. In no prior case has this Court had to determine whether such an operating agreement, originating from the failing condition of one of the daily newspapers, requires accommodation between the economic goals of antitrust policy and

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the inappropriateness of summary judgment in cases involving complex questions. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 at 473 (1962); *White Motor Co.* v. *United States*, 372 U.S. 253 at 264 (1963).

For an extensive Rule of Reason analysis of the factors involved in an agreement between two motion picture distributing companies, see *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960), where the agreement was held as a reasonable restraint ancillary to a lawful primary purpose. In the same case, 169 F. Supp. 888, 895 (S.D.N.Y. 1959), the court denied the Government's motion for summary judgment on a Section 1 price fixing charge.

the public interest in the objectives of the First Amendment.

We submit that, in view of the facts and circumstances surrounding the 1940 agreement herein, and other similar agreements existing in twenty-one other cities involving forty-two other daily newspapers, the touchstone for resolution of that apparent conflict is recognition of the political and social values of preserving the two diverse and independently competing sources of editorial voices in the community as paramount to the consolidation of the business operations of the two daily papers.

Neither the Government nor the District Court revealed awareness or concern regarding the public importance of making such an accommodation. In complete disregard of the peculiar structural and behavioral characteristics of the daily newspaper publishing business, detailed under I, *supra,* the Government mechanically advocated the application of Section 1, Sherman Act, illegal *per se* rules on *a priori* assumptions that daily newspapers are basically no different than the manufacture and sale of industrial commodities and services.

This Court has warned that illegal *per se* rules under Section 1 of the Sherman Act are inapposite in situations where the Rule of Reason "normally requires an ascertainment of the facts peculiar to the particular business," *White Motor Co.* v. *United States,* 372 U.S. 253 at 261 (1963).

The Government mistakenly convinced the District Court that settled Sherman Act principles precluded a Rule of Reason approach. Accordingly, the Govern-

ment blinded itself to the distinction this Court has made between contracts, agreements, combinations or conspiracies between competitors which are "naked restraints of trade with no other purpose than the stifling of competition" (*White Motor,* supra, at 263) and restraints which have a superior public interest justification.

Since we hereafter analyze this distinction more fully, we simply add here the like perceptive qualification of Mr. Justice Black in *Northern Pacific Ry Co.* v. *United States,* 356 U.S. 1 at 5 (1958). He there said, after pointing out that this Court has construed the Sherman Act to prohibit only unreasonable restraints of trade:

> However, there are certain agreements or practices which *because of their pernicious effect on competition and lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use * * *. (emphasis supplied)[28]

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[28] It is of import that Justice Black, in his *Northern Pacific* opinion, supra, after stressing the Sherman Act's policy to preserve competition, added a significant qualification in these words:

> "* * * while at the same time providing an environment conducive to the preservation of our democratic political and social institutions".

This is the kind of accommodation the Amicus advocates here. The rescue of the Citizen from oblivion in 1940 through the operating agreement has since then given the community a viable competition between the Star and Citizen in news and editorial dissemination. This has preserved an environment in the Tucson area conducive to effectuation of political and social values our democratic system cherishes. But this could not have been achieved without the consolidation of the commercial functions of the Star and Citizen in TNI.

Here the operating agreement has no "pernicious effect" on competition and does not lack a "redeeming virtue." We submit that there is no tenable basis for the Government's contention that the provisions of that agreement on its face create "naked restraints of trade with no other purpose than the stifling of competition." By relying upon cases ruled illegal *per se* by this Court under Section 1 of the Sherman Act, factually different from this case,[24] the Government ignored the two-level competition which makes this case unique. The redeeming virtue of continuing vigorous competition on the level of news, features and editorial opinions is erroneously brushed aside by the Government. Also ignored is the justification for the operating agreement as one originating from the failing condition of the Citizen as of 1940 when the agreement was consummated and in a city which can not economically support two separately-owned and fully competing daily papers.

These countervailing considerations, we urge, place the issues of law and fact in this case in a posture which normally calls for a Rule of Reason adjudication in the context of the facts peculiar to the daily newspaper business in the local market in which the Star and Citizen respectively serve its readers and advertisers.

In V, *infra,* we explicate the relevance of the judicial process this Court has employed in applying the ancillary restraints doctrine as an integral part of the Rule of Reason method of adjudication. Under that approach, we take the position that the partial merger of business operations stemming from the 1940 operat-

[24] See Appendix I.

ing agreement, is reasonably ancillary to the effectuation of the main lawful purpose of maintaining news and editorial competition between the Star and Citizen in fulfillment of the diversity contemplated by the First Amendment.

The ANPA does not question the fundamental principles underlying this Nation's antitrust policy as a distinctive means for assuring a private competitive enterprise system. Nothing here is intended to suggest that daily newspaper publishers are not subject to antitrust prohibitions aimed at curbing abuses of business conduct by contracts, agreements, combinations, conspiracies or practices which have no other purpose than the suppression of competition. Likewise, the ANPA does not suggest that the First Amendment provides constitutional immunity from the above types of antitrust violations.

This is not a case where our contentions are at odds with either antitrust or First Amendment principles. A major premise of the Amicus is that commercial competition should not be regarded as the invariable and absolute *summum bonum* of a democratic society in which conditions essential to the virility of our political and social institutions are of greater public importance than unfettered business competition.

This is such a case. For our political and social freedom does not wholly depend upon unrestrained business competition. The daily newspaper publishing business is the kind of enterprise in which an operating agreement between two daily newspapers, essential to the rehabilitation and continued publication of a failing newspaper, has the unique duality which justifies subordinating purely economic values to the noncom-

mercial values the free newspaper press serves in an open democratic society.

The need for such accommodation has been stressed by eminent spokesmen for that point of view.

The late Professor Zachariah Chafee, who was an ardent progressive thinker and spokesman on freedom of speech and the press, warned against the danger of over-extended use of the antitrust laws in his two volumes on *Government and Mass Communications.*[25] While sponsored by the Commission on Freedom of the Press, of which Professor Chafee was Vice Chairman, these volumes present Professor Chafee's views as his individual position.

We note that this massive work of Professor Chafee covers a range of analysis most of which is on topics unrelated to the issues in this case. We here refer only to those observations and conclusions relevant to the accommodation of the antitrust laws and the press—the daily newspapers and other mass communications media.

The Chafee theme is that the antitrust laws have a limited role as applied to the press. Two basic questions must be kept in mind in any discussion of the antitrust laws and the press:

> "First, what do we want from the press? * * *.
>
> "Second, will the antitrust laws give us what we want * * *." (V. 2 at 584)

At a later place, after numerous reflections on the subject, Professor Chafee concluded that:

> "Besides being unlikely to give us the kind of press we want, the Antitrust Laws may, if exten-

[25] University of Chicago Press (1947).

sively used, produce the kind of press we do not want * * *." (V. 2 at 666)

It is not possible within the limited purpose of this reference to Professor Chafee's volumes to place in full context the depth and details of his analysis. We believe it fairly summarizes his underlying process of reasoning to say that Professor Chafee was convinced that the antitrust laws should be sparingly used against the press either to cure concentration in mass media or other structural characteristics arising from natural economic forces.

The main thread of Professor Chafee's thesis is that the antitrust laws can and should be used to prevent and correct abuses of power and business practices, such as predatory conduct aimed at suppressing competition. He distinguishes this antitrust attack upon illicit business behavior from attempts to use the antitrust laws to break up structural bigness in mass communications media. He stressed that the antitrust laws have not been effective in stemming the trend toward concentration in industries producing and selling raw materials and commodities and he saw no greater assurance that the Sherman Act can counteract a like inevitable trend in mass communications. (V. 2 at 588-594)

The Amicus does not purport to present the foregoing views of Professor Chafee for an overall appraisal of his two-volume treatise. Rather, we present them as illustrative of the problem of accommodation of antitrust policy to the press—the precise problem, we think, this Court faces in resolving the specific issues in this case.

Congressman Emanuel Celler, the eminent Dean of the House of Representatives and Chairman of the Antitrust Subcommittee of the House Judiciary Committee, has expressed himself with respect to daily newspaper operating agreements. In an interview published in *Editor & Publisher,* February 16, 1963, prior to a brief inquiry by the House Antitrust Subcommittee into various phases of the daily newspaper publishing business, Mr. Celler stated that "Our chief interest is to keep newspapers alive." He referred, *inter alia,* to joint newspaper arrangements in a context of reflections keyed to the very issue of accommodation of the antitrust laws to the preservation of a failing newspaper. Those portions of his comments are quoted in full context:

> "There has been evidence of joint ventures and joint organization between papers in given towns or cities in violation of the anti-trust laws.
>
> Some of these arrangements are fair and equitable. Some may involve undue restraints, when agreements are made as to rates and terms for advertising in violation of the law.
>
> We don't know yet what the full inquiry will disclose. It may be that where the agreements are demonstrated to be fair and equitable it will be decided that it would be too harsh to penalize those who are concerned.
>
> Personally, I incline to the view that perhaps there might be immunization for newspapers from anti-trust laws in certain cases. If anti-trust laws were rigidly enforced it may be shown that more harm than good would result.
>
> When it comes down to that kind of choice, I think the preservation of the press outweighs a violation of the anti-trust laws. Now that does

not mean that publishers will be left absolutely free to make all kinds of agreements. Each agreement must be tested as to whether or not it is worthwhile, whether or not it is in the public interest, the welfare of the community and the free press in general."

It should be noted that Mr. Celler made no prejudgment on facts. His comments were directed to the process of judicial interpretation of the antitrust laws.

A joint arrangement for consolidation of commercial operations creates efficiencies and economies which permit the failing daily paper to survive. Construction of the Sherman Act as automatically and universally requiring full commercial competition between two city daily newspapers, even though one of them was a failing newspaper at the time a joint operating agreement was entered into, clearly does not foster the competitive diversity of news reporting and editorial voices such as the 1940 operating agreement in this case has assured.

It underscores the urgency of making a proper accommodation of antitrust prohibitions to the overriding interest of the public in keeping alive the rivalry of the two independent daily newspaper sources of information and ideas.

In conclusion, on this point we must again call the Court's attention to the observations made by the District Court and by the Government to the effect that were there a total merger here, such a merger would have been approved. Let us analyze for a moment what this means. In at least 150 cities in the United States there are single ownerships of two daily newspapers. The only difference in those single owner-

ships and in the fact situation here before the Court is that in those 150 cities a single corporate entity is involved. Here we have three corporate entities. What is the practical effect of this?

In each of the 150 cities, the single ownership maintains a separate editorial department devoted to the separate handling of news, features, and editorial comment in the 300 daily newspapers involved. The business departments including advertising, promotion, circulation, mechanical, and all parts of the business departments of those 300 daily newspapers are merged into 150 business departments.

In Tucson, separate corporate entities did exactly what single corporate entities do in the 150 single ownership cities. What is the reason, justice, or plain common sense of finding appellants violative of the Sherman Act in light of these facts?

V.

THIS CASE IS APPROPRIATE FOR THE APPLICATION OF THE RULE OF REASON OF WHICH THE DOCTRINE OF RESTRAINTS ANCILLARY TO A MAIN LAWFUL PURPOSE IS AN INTEGRAL PART.

This Court, as the final judicial interpreter of the federal antitrust laws, has approved and reaffirmed the Rule of Reason as the polestar of adjudication in any given Sherman Act case.

Superficially considered, it may at first blush appear that there is an inherent contradiction between illegal *per se* Sherman Act rules and the Rule of Reason. This Court rejected such a simplistic view, as will be hereafter shown.

In the landmark opinion of the Court in *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911), the Rule of Reason was read into the Sherman Act as a general rule of construction in all Sherman Act cases.

In *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377 at 387 (1956), this Court said:

> "Judicial construction of antitrust legislation has generally been left unchanged by Congress. This is true of the Rule of Reason. While it is fair to say that the Rule is imprecise, its application in Sherman Act litigation, as directed against enhancement of price or throttling of competition, has given a workable content to antitrust legislation * * *. It was judicially declared a proper interpretation of the Sherman Act in 1911, with a strong, clear-cut dissent challenging its soundness on the ground that the specific words of the Act covered every contract that tended to restrain or monopolize. *This Court has not receded from its position on the Rule* * * *." (emphasis applied)

Refuting a contention that is sometimes asserted, the Court continued:

> "There is not, we think, any inconsistency between it [the Rule of Reason] and the development of the judicial theory that agreements as to maintenance of prices or division of territory are in themselves a violation of the Sherman Act. It is logical that some agreements and practices are invalid *per se,* while others are illegal only when applied to particular situations."

It is this bifurcation which Mr. Justice Black stressed in distinguishing two classes of Sherman Act restraints in *Klor's, Inc.* v. *Broadway-Hale Stores,*

Inc., 359 U.S. 207 at 211 (1959). Referring to the 1911 *Standard Oil* case, *supra*, he said:

> "* * * The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their 'nature or character' were unduly restrictive, and hence forbidden by both the common law and the statute * * *. As to those classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred * * *."

The Amicus sees no inconsistency between Justice Black's classification of restraints in *Klor's* and his statement one year earlier of the illegal *per se* types of restraint in *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 at 5 (1958). As pointed out earlier, Justice Black characterized the conclusively unreasonable agreements as those which have a "pernicious effect on competition" coupled with a "lack of any redeeming virtue." This must mean that the Justice recognized an exception in a factual showing that the effect on competition is not "pernicious" and where a "redeeming virtue" is shown to exist.

This rationale is further confirmed by the comments of Justice Douglas in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963). In that case this Court reversed a summary judgment by the District Court. In relevant part, the lower court ruled that vertical territorial limitations imposed by White on distributors and dealers in White trucks were illegal *per se* under Section 1 of the Sherman Act.

Justice Douglas concluded that "the applicable rule of law should be designed after a trial." He said at 261:

> "This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact both of that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us." (emphasis by Justice Douglas)

Justice Douglas again made it clear that this Court has not receded from the Rule of Reason, as earlier stated in the *du Pont Cellophane* case, *supra.* Stating that the 1911 *Standard Oil* case "read into the Sherman Act the 'Rule of Reason'," he continued at 261:

> "that 'Rule of Reason' normally requires an ascertainment of the facts peculiar to the particular business * * *."

The Justice then quoted from *Chicago Board of Trade* v. *United States,* 256 U.S. 231 at 238 (1918). (see *infra*)

In II, *supra,* the Amicus emphasized that the Government's reliance on the *per se* illegality decisions of this Court in Section 1, Sherman Act, cases cited by the Government in footnote 9 at p. 14 of its Motion to Affirm misconceives the very distinction between the two classes of Section 1, Sherman Act restraints this Court has explicated as shown above.

Despite the fact that Justice Black has listed tying arrangements as an illegal *per se* species of violation in *Northern Pacific, supra,* Justice Douglas, after quoting from that opinion, nevertheless observed that a

tying agreement "*may fall* in that [illegal *per se*] *category, though not* necessarily so." (at 262) (emphasis supplied) He later added that the Court "recently noted the importance of the nature of the tying arrangement *in its factual setting*" (emphasis supplied).

The Government, however, would have this Court repudiate any qualification of the illegal *per se* horizontal restraints, ignoring this Court's caveat in the *du Pont Cellophane* case, *supra,* that there is no inconsistency between *per se* illegal rulings applied to some agreements and a Rule of Reason inquiry as applied to other agreements. The Government also conveniently overlooks Justice Black's qualification that even horizontal restraints may not conclusively have a "pernicious effect on competition and lack of any redeeming virtue." Justice Douglas in *White Motor,* like Justice Black in *Klor's* and *Northern Pacific,* regarded conclusively illegal only, to use Justice Douglas' words :

> "naked restraints of trade with no purpose except the stifling of competition" (*White Motor, supra,* at 263).

Without repeating the showing of the relevance of the foregoing distinctions to the issues in this case, as set forth in III, *supra,* we submit that this is not a case which should be categorized as one involving illegal *per se* Sherman Act, Section 1 violations. Here, there is the "redeeming virtue" of preservation of viable competition between the Star and Citizen in their independent dissemination of news, features, and editorial views from their separately maintained and op-

erated editorial departments as specifically provided in the 1940 operating agreement.

This is comparable to what Justice Douglas stated as a concluding part of his *White Motor* opinion at 263, as follows:

> "We need to know more than we do about the actual impact of these arrangements [the territorial limitations] on competition to decide whether they may have such a 'pernicious effect on competition and lack of any redeeming virtue * * * ' and therefore should be classified as *per se* violations of the Sherman Act."

The Amicus submits that the Court in this case has the same need for knowing more about the impact of the 1940 operating agreement on competition. This should lead this Court to decide that, by excluding offers of evidence and proof on disputed legal and factual issues, the District Court erred in summarily deciding that the provisions of the operating agreement pertaining to consolidation or merger of the commercial and business operations of the Star and Citizen were *per se* violations of Section 1 of the Sherman Act.

In a concurring opinion in *White Motor* by Justice Brennan, notable for the depth of analysis of differentiations between the territorial and customer restrictions in the White franchises, the Justice agreed with the majority that "* * * it would be premature to declare either the territorial or the customer restrictions illegal *per se*, since 'we know too little of the actual impact of [either form of restraint] * * * to reach a conclusion on the bare bones of the * * * evidence before us' * * *." (at 264)

This led Justice Brennan to analyze the distinct problems "raised by the two types of restriction" and he thought "the District Court will wish to have in this distinction mind at the trial." (at 264)

With respect to the territorial limitations, which he felt involved a restraint on alienation by competitors of White, he stressed that while inherently suspect under the antitrust laws, this did not "tell us that every form of such restraint is utterly without justification and is therefore to be deemed unlawful *per se.*" (at 265)

For that he referred, as the Amicus has done above, to *Northern Pacific,* emphasizing, as we do, that the illegal *per se* agreements apply only to those with "pernicious effect on competition and lack of any redeeming virtue." He concluded at 265-266 that:

> "* * * to gauge the appropriateness of a *per se* test for the forms of restraint involved in this case, then, we must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition and economic justification would be similarly irrelevant. * * *".

With respect to the territorial limitations, Justice Brennan concluded the courts have not had sufficient experience to warrant branding them as illegal *per se.* The Justice quoted, as did Justice Douglas, the celebrated passage from Justice Brandeis' opinion in *Chicago Board of Trade* v. *United States,* 246 U.S. 231 at 238 (1918), setting forth the criteria for a Rule of Reason approach.

Regarding the customer restrictions, Justice Brennan, after a close analysis of the justifications offered by White, concluded that such restrictions did not

appear to be sanctioned. He foresaw that the Government on the trial will necessarily prevail unless the proof warranted that the distributors of White trucks, absent the customer restrictions, could not in any event compete for certain accounts reserved by White. (at 275)

Justice Brennan's concurring opinion appears to be unique in Supreme Court antitrust cases in the respect that it sets forth guidelines the District Court might wish to follow. We are not here concerned with the merits of the restrictions Justice Brennan analyzed. We think Justice Brennan has impressively demonstrated the crucial importance of avoiding an automatic classification of certain types of restraints as illegal *per se* on the basis of superficial similarities which obscure inquiry into equally important and at times dispositive differences.

In this case, the two-level functions of a daily newspaper—on one level the commercial functions and on the other level the journalistic press functions—bring into focus the decisive differences not present in any prior antitrust case before this Court. The 1940 operating agreement, stemming from the failing condition of the Citizen, unified through TNI only the commercial businesses of the Star and Citizen and left separate and independent the editorial departments of each newspaper to effectuate the primary purpose of maintaining competition on that level of rivalry in press functions.

Those differences clearly make this an inappropriate case for application of mechanical *per se* rules and a summary judgment under Section 1 of the Sherman Act.

Evolution of Reasonable Ancillary Restraints Doctrine as an Integral Part of the Rule of Reason

The reasonable ancillary restraints doctrine has its roots in the common law and has been read into the Sherman Act by this Court beginning with the epochal *Standard Oil* opinion of 1911 and thereafter reaffirmed by this Court.

At common law restraints of trade were historically associated with covenants not to compete.[26] The principles governing such covenants in restraint of trade were formulated in the celebrated opinion of Chief Justice Taft (then Circuit Judge) in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.* 175 U.S. 211 (1899).

From that opinion stemmed the basic distinction between ancillary and non-ancillary restraints of trade.

An ancillary restraint refers to a covenant or agreement which is subordinate to the main lawful purpose of a larger transaction it is designed to effectuate. Among the types of such ancillary restraints described by Justice Taft were (a) an agreement by the seller of a business not to compete with the buyer so as to derogate from the value of the business sold, and (b) an agreement by a partner, pending the partnership, not to interfere by competition with that business.

A non-ancillary restraint refers to an agreement the sole purpose of which is to eliminate competition—the so-called naked covenant not to compete.

Applying this distinction, Justice Taft's view was that the non-ancillary restraints were unreasonable. He said that "no conventional restraint of trade can

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[26] See Oppenheim & Weston, Federal Antitrust Laws—Cases and Comments 3-10, 15-18 (3d. ed. 1968).

be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract." Concluding his comments on non-ancillary contracts, Justice Taft said:

> "There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

This distinction between ancillary and non-ancillary restraints of trade was carried over into this Court's Rule of Reason construction of the Sherman Act beginning with the landmark 1911 *Standard Oil* opinion of this Court as previously traced in detail.

It should be carefully noted that the ancillary restraints doctrine was made a constituent and integral part of the Rule of Reason approach of this Court. It is only a matter of form, and not of substance, that this Court at times has used the word "ancillary" in conjunction with the word "restraints", while at other times the Court, without the use of "ancillary," has embodied the same meaning in the criteria formulated by Justice Brandeis in *Chicago Board of Trade, supra,* and since then quoted by this Court in recent cases.[27]

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[27] In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 at 391-392 (1967), a case involving different factual issues than the instant one, Justice Stewart, with whom Justice Harlan joined in an opinion concurring in part and dissenting in part, specifically referred with approval to the doctrine of ancillary restraints. Without intending any inference regarding the merits in *Schwinn*, the passage quoted below is one we believe is in accord with long settled Sherman Act principles in opinions of this Court:

> "• • • As early as 1711 it was recognized that only *unreasonable* restraints should be proscribed, and that partial restric-

There is no doubt that in the course of its judicial interpretations of the Sherman Act, this Court has crystallized the same substance of the distinction between the lawful ancillary restraints of trade and restraints which have as their sole object the stifling of competition. In present antitrust parlance, this Court has accordingly classified the latter as illegal or unreasonable *per se* Sherman Act violations while, at the same time, consistently stating that the reasonableness of restraints, other than those of an inherent illegal *per se* character, can be determined only after an ascertainment of all the relevant facts and an examination of surrounding circumstances.

In the latter category are the restraints reasonably ancillary to the effectuation of an overall main lawful purpose. This, contrary to the Government's contention regarding the 1940 operating agreement (Motion to Affirm at 2) does not seek to justify a *per se* violation. Rather, it poses the threshold issue, articulated *supra,* of whether the restraints are reasonable or unreasonable.

The pertinent criteria are embodied in the juristic contribution Justice Brandeis made in elaborating the judicial technique of applying the Rule of Reason by specifying the criteria governing its application. The following notable passage from his opinion in

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tions could be justified when ancillary to a legitimate business purpose and not unduly anticompetitive in effect. Mitchel v. Reynolds, I.P. Wms. 181, 24 Eng. Rep. 347. Cf. Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143. This doctrine of ancillary restraints was assimilated into the jurisprudence of this country in the nineteenth century, see Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64; United States v. Addyston Pipe & Steel Co., 85 F. 271." (emphasis by Justice Stewart.)

Chicago Board of Trade v. *United States,* 246 U.S. 231 at 238 (1918), since then approvingly quoted by this Court, assimilates in it the reasonable ancillary restraints concept previously discussed.

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The appraisal of the intent and main lawful purpose of the 1940 operating agreement in the light of Justice Brandeis' criteria fits aptly into the method of adjudication he set forth; *viz:*

(1) Consideration of the facts peculiar to the daily newspaper business in the relevant market to which the consolidation of the commercial functions of the Star and Citizen under the operating agreement applies;

(2) The failing condition of the Citizen before the 1940 agreement and the financial rehabilitation of the Citizen since the 1940 agreement;

(3) The nature of the restraint alleged to have been created by the consolidation through TNI of the business operations of the Star and Citizen and its effect in achieving cost economies and efficiency essential to profitability of two city dailies and to avoid a recurrence of the failing condition of the Citizen in a city unable economically to support two dailies in complete commercial competition;

(4) The main lawful purpose or end sought to be attained of keeping alive two competitive and independent sources of news and editorial voices through separate news and editorial departments of each of the two daily newspapers, as the primary purpose for the consummation of the 1940 operating agreement.

An ascertainment of all of the foregoing relevant facts and circumstances—which the District Court foreclosed by its illegal *per se* ruling under Section 1 of the Sherman Act—is essential to determine the reasonableness of the consolidation under the operating agreement of the commercial functions of the Star and Citizen as means subservient or ancillary to the paramount lawful purpose of making available to the readership in the market served the diversity which two daily papers, with separate corporate and name identity and separate, competitive editorial departments, can effectively achieve.

V.

THE FAILING COMPANY DOCTRINE SHOULD HAVE BEEN APPLIED AS A DEFENSE TO THE PARTIAL MERGER CONSUMMATED BY THE 1940 OPERATING AGREEMENT.

Brushing aside inquiry into the primary purpose of the 1940 operating agreement as the workable ancillary means of maintaining two competitive sources of news

and editorial voices, the Government, persisting in its inflexible and mechanistic reliance on illegal *per se* Sherman Act rules, compounded the misuse of theoretical labels by contending that the agreement "differs significantly from a merger" (Motion to Affirm at 21.)

This is a conceptual error. Whether viewed from a Sherman Act or Section 7 Clayton Act standpoint, this Court has not insisted upon neat and trim categories in merger cases. Cf. *United States* v. *Philadelphia National Bank,* 374 U.S. 321 at 335 (1963). The Government's own summation of certain relevant provisions of the agreement (Motion to Affirm) at 4-5, warrants the conclusion that both in substance and practical effect the operating agreement accomplished a partial merger of the property interests and business functions of the Star and Citizen. The following provisions are the relevant ones on this point:

(1) The agreement placed in joint ownership the production and distribution equipment of the Star and Citizen and transferred possession of those assets to TNI.

(2) TNI is owned in equal shares by the Star and Citizen.

(3) TNI manages and operates all of the departments of the publishing business of the Star and Citizen (except the news and editorial departments) and TNI integrates the business operations as much as possible.

The Government shut its eyes to the reality that once the separate commercial businesses of the Star and Citizen into a partial merger or partial joint ven-

ture[28] was achieved, TNI thereafter acted as a *single enterprise entity* in determining vertically the circulation and advertising rates of both papers. Instead, the Government rested its Section 1 case on the erroneous characterization of the agreement as horizontal illegal *per se* "price fixing" as though TNI created a combination and conspiracy between two competitors to fix prices.

This resort to a misleading label runs counter to the normal and usual course of doing business in merged commercial operations. To condemn this out of hand is tantamount to making every such merger or joint venture unreasonable *per se* even though, as here, such a transaction or arrangement stems from the primary purpose of resurrecting a failing newspaper so that it may remain in effective competition in the non-commercial press functions as one of two sources of news, features, and editorial opinions. This theory would

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[28] Cf. *United States* v. *Penn-Olin Co.*, 378 U.S. 158 (1964). There the Court held that a joint venture was not in violation of the Sherman Act but came within Section 7 of the Clayton Act. Its legality is to be tested by inquiry under the Rule of Reason criteria set forth by the Court. The Court stated at 170 that "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy. * * *"

The courts have consistently set forth the elements of a joint venture as (a) an agreement; (b) a single business enterprise; (c) a joint proprietary interest; (d) an agreement to share profits or losses; and (e) each is to have a voice in control and management of the entity created for the joint venture. Illustrative of numerous judicial opinions setting forth the above criteria are *Eagle-Pitcher Co.* v. *Mid-Continent Lead & Zinc Co.*, 209 F.2d 917 at 919 (10th Cir. 1954); *Wooten* v. *Marshall*, 153 F. Supp. 759 at 763 (S.D.N.Y. 1957); *McElwee* v. *Curtiss-Wright Corp.*, 70 F. Supp. 97 at 102 (E.D. Mo. 1947).

sound the death-knell for every operating agreement similar to the one in this case and also having as its main purpose the salvaging of a failing newspaper.

The paradoxical consequences of the Government's *per se* approach to this *partial* merger is underscored by the District Court's comment that a *complete merger* as of 1940 of the Star and Citizen would have made pertinent the failing company defense (Tr. Feb. 15, 1967 at 412).

We are at a loss to fathom the reasoning of the Government in stating, on the one hand, that a merger between competitors "may serve a variety of legitimate purposes" (Motion to Affirm at 21) and that "it has been deemed inappropriate to apply a *per se* rule to mergers" (Ibid. at 22), and then, on the other hand, by a mere *ipse dixit,* change the nature of the partial merger or partial joint venture through TNI into an illegal *per se* price fixing agreement between competitors "serving no purpose except the elimination of competition."

The business self-interest of the parties to the operating agreement is not *without more* the purpose of its consummation. To be sure, the incentive of the Star and Citizen to publish two corporately separate and profitable daily metropolitan newspapers—conjoined with preventing the economically inevitable death of the Citizen and a resulting single daily newspaper—is a normal private enterprise motivation. But here that self-interest coincides with the preservation of competition in the daily newspaper press functions of independently gathering and disseminating news and editorial ideas. Cynics to the contrary, the latter is the end purpose thrust upon newspaper publishers by the First Amendment.

This merely serves the Government's convenience by sweeping under the rug the true character of the agreement as one whereby the partial consolidation of the commercial functions was reasonably ancillary to the prime purpose of saving the failing Citizen from extinction and enabling it to remain in competition with the Star as rivals in news reporting and editorial expressions.

The same wrong labels were used by the Government in persuading the District Court that the agreement also constituted illegal *per se* "profit pooling" and "market allocation." The agreement, as a partial joint venture in commercial functions, also made TNI the *single entity* through which a division and distribution of revenues by TNI to its stockholders is made. This is a normal and judicially recognized element of such a partial joint venture. The Star and Citizen became partners or joint venturers in sharing risks of losses as well as profits. Within the limits of the unification of the commercial business, previously separately conducted, labeling the Star and Citizen competitors in such functions is simply a negation and distortion of the true character of the agreement.

The same objection applies to the Government's label "market allocation." It offends common sense and business actualities to brand as illegal *per se* an arrangement which makes one partner in a common lawful purpose obligated not to compete with the other partner to vitiate the partial merger.[29]

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[29] In *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 at 280 (6th Cir. 1898), Chief Justice (then Circuit Judge) Taft said:

"• • • When two men become partners in a business, although their union might reduce competition, this effect was

In sum, the Government by grounding its Section 1 case on the premise that the operating agreement is illegal *per se,* convinced the District Court that appellants were trying to justify the agreement by business necessity. As fully discussed in III herein, the threshold question the Government begged is whether this case was appropriate for a Rule of Reason inquiry of which the doctrine of reasonable ancillary restraints is a component.

This brings into purview the rejection by the District Court of the failing company defense. The illegal *per se* ruling of the District Court foreclosed adequate scrutiny under the Rule of Reason of all of the relevant circumstances surrounding the inception of the 1940 agreement. More importantly, the District Court failed to use the proper legal criteria for application of the failing company doctrine and made a clearly erroneous finding of fact thereon (Finding 17, quoted *infra.*)

Novel antitrust legal and factual questions regarding the exact limitations of the failing company doctrine, which this Court has not yet had occasion to clarify and adjudicate, are presented and are of concern not only to the daily newspapers now under oper-

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only an incident to the main purpose of a union of their capital enterprise, and energy to carry on a successful business and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged".

The analogy to the operating agreement herein is instructive. There is only a union of commercial operations as ancillary means of effectuating the main end of enabling the Citizen to stay alive and compete with the Star in news reporting and editorial ideas.

ating agreements but also for future guidance of other members of the ANPA.

In the interest of brevity, we quote only the conclusory Finding 17 which, in relevant part, states:

> "* * * At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement."

We first point out that the failing company doctrine was first recognized as a defense in *American Press Ass'n* v. *United States*, 245 F. 91 (7th Cir. 1917). This was a Sherman Act proceeding involving the acquisition of American Press by its sole competitor, Western Newspaper Union, in a declining relevant printing market. American had been losing $3,000 per month and had no funds to build modern printing facilities to maintain its competitive status. There were no other prospective buyers of American's assets. The court held there was no Sherman Act violation. It concluded that if the merger were not permitted, American would have soon failed anyway, leaving Western alone in the market. The court found there would be greater injury to American's stockholders and the public if American's assets were not used at all.

The failing company defense applies equally under the Sherman Act as well as under Section 7 of the Clayton Act. In either event, we think the defense was available to the Citizen as of 1940.

In summary form we set forth the plurality of factors in the District Court's subsidiary Findings 12, 14 and 15 which show that Finding 17 is inherently contradictory and clearly erroneous.

From 1932 to 1940 the Citizen operated at a substantial loss; it could not obtain additional financing; for many years prior to 1940 it was unable to pay a dividend; by March, 1940, it owed debts of more than $109,000 of which $79,000 was to its stockholders.[30]

It is puzzling beyond belief how the District Court, having made the above subsidiary findings of fact, arrived at its ultimate finding that the Citizen "was not then on the verge of going out of business" or that there was no "serious probability" that the Citizen would have ceased publishing without the operating agreement.

We submit that newspaper publishers generally would regard the subsidiary findings of fact summarized above as meeting the most exacting test of imminent bankruptcy or hopeless insolvency formulated by this Court in *International Shoe Co.* v. *FTC,* 280 U.S. 291 at 302 (1930), in its first treatment of the failing company defense. Yet the Government's Motion to Affirm at 18 cryptically asserts that the "essential elements of the defense did not exist when the 1940 agreement was consummated" and that Finding 17, *supra,* shows that the Citizen did not meet the test of

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[30] The fact that William Small, Sr. subsidized the losses of Citizen out of his resources other than Citizen is not relevant to the criteria for determining what is a failing company. The Amicus knows of no case where a court has judged the failing condition of a company by departing from inquiry whether a company is in the "red" or the "black" based on its own financial statement.

"the grave probability of a business failure", citing *International Shoe, supra.*

Even though we believe the Citizen in 1940 met the severe failing test of *International Shoe, supra,* it is abundantly clear that there is no awareness by the Government of the peculiar characteristics of the daily newspaper publishing business. In I, *supra,* we presented a detailed analysis and empirical data regarding the relevant unique structural and behavioral characteristics of that business. Here reference is made to the reality that unlike a shoe factory, a daily newspaper reaches the point of no return as a separately owned and fully competitive medium even before it has declined to the point of imminent bankruptcy. Unless the failing paper can lawfully resort to a joint operating agreement, it either must enter into a complete merger or it will discontinue publication. The two daily newspaper city will then be reduced to a single daily city by intractable forces in a city unable economically to support two separately owned and fully competing papers.

In rare instances, the failing paper might be sold but no person outside the community and experienced in the business is likely to purchase the failing paper, except perhaps at a bid accepted as a sacrifice by the owner. Experience confirms that in a city where the failing paper is a morning daily and the successful other paper is an evening daily, or the other way around, the financially sound competitor already established in the market may possibly find it feasible to buy out the failing paper and continue publication of them as the single owner.

The other alternative is the joint commercial operating arrangement, as in the instant case, which per-

mits the failing paper to be rehabilitated and provides for its continuance in separate and independent editorial competition with the other daily. When this alternative is employed, the Court can take judicial notice that the public interest in that community is better served by two dailies.

We submit, and experience confirms, that in nearly every instance the failure of a daily newspaper has greater adverse effects upon the community in question than the failure of one of several or many firms producing and selling, or engaged solely in distributing, industrial commodities.

In this case, as stated above, the Citizen as of 1940 measured up to the traditional *International Shoe* test. Nevertheless, the unrealistic Finding 17 might have been averted if the District Court had taken into consideration the unique circumstances which tend toward making the point of no return from demise of a newspaper to arise earlier than the "imminent bankruptcy" traditional test applied to an industrial enterprise.

As indicated earlier, this Court has not yet had occasion to clarify to what extent limitations may be placed upon the failing company doctrine. In *United States* v. *Diebold, Inc.*, 369 U.S. 654 at 655 (1962) the Court in a *per curiam* opinion reversed the District Court's summary judgment for defendants on the grounds that (a) there were genuine issues of material fact as to the acquired company's failing condition, and (b) as to whether "Diebold was the only prospective bona fide purchaser for [its] business." This suggests that it may be required to be shown that there are no other available alternatives, or purchasers

whose merger with the failing company would have less anticompetitive effect. Beyond the above mentioned factors, a failing condition short of actual hopeless insolvency would still be relevant on the question of competitive effect.

It is noteworthy that in *White Motor Co.* v. *United States,* 372 U.S. 253 at 263-264 (1963), Justice Douglas analogized a merger case to that case in arriving at the conclusion that a summary judgment is improper. He stated that

> "* * * A merger that would otherwise offend the antitrust laws because of a substantial lessening of competition has been given immunity where the acquired company was a failing one [citing International Shoe] * * *. But in that case, as in cases involving the question whether a particular merger will tend 'substantially to lessen competition' (Brown Shoe Co. v. United States, * * * pp. 328-329 of 370 U.S.), a trial rather than the use of summary judgment is normally necessary. United States v. Diebold, Inc., * * * [supra]."[31]

We mention the foregoing solely to show that in arriving at its Finding 17 the District Court summary ruling under Section 1 seriously prejudiced appellants'

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[31] In *Brown Shoe Co.* v. *United States,* 370 U.S. 294 at 319-320 (1962), this Court noted that in a complete merger the 1950 amendment to Section 7 of the Clayton Act is intended by Congress to preserve the failing company doctrine of *International Shoe Co.* v. *FTC,* 280 U.S. 291 (1930). The Court also referred to the Congressional intent that Section 7 would not impede "a merger between a corporation which is in financial health and a failing one which can no longer be a vital competitive factor in the market".

These observations are applicable to a failing company situation arising under the Sherman Act.

offers of evidence and proof that would have established not only that the Citizen satisfied the criteria for availability of the failing company defense but also that the operating agreement was the alternative involving less anticompetitive effects than leaving the Star in the market as the single daily newspaper. As of 1940 the record shows that there was no prospective purchaser for the Citizen.

VI.

THE SECTION 1, SHERMAN ACT CASES RELIED UPON BY THE GOVERNMENT ARE FACTUALLY DISTINGUISHABLE FROM INSTANT CASE AND NOT IN POINT.

Previous parts of this Brief have dealt with the substance of this contention. Here, in the interest of brevity, the Amicus merely states again the proposition that the 1940 operating agreement on its face does not fall within the class of Sherman Act agreements this Court has recognized as illegal *per se*.

The cases relied upon by the Government (footnotes 9 and 10 at 14 of Motion to Affirm) are factually different from this case and hence are not relevant. All of them involved agreements, combination or conspiracy held by this Court *to have no purpose other than the suppression of competition.* In none of them did the Court find a restraint reasonably ancillary to a main lawful purpose or redeeming virtue.

In view of the Court's familiarity with these cases, we merely summarize the factual differences from this case and the Court's holding in each of the cited cases. In order not to interrupt the sequence of the text of the argument, those summaries are attached to this Brief as Appendix I.

VII.

THE DISTRICT COURT'S SUMMARY TREATMENT OF SECTION 1 ISSUES ERRONEOUSLY PREJUDICED APPELLANTS' INTERRELATED SECTION 2, SHERMAN ACT DEFENSE.

The District Court's conclusion that the 1940 operating agreement violated Section 2 of the Sherman Act erroneously stemmed from the court's summary ruling that the agreement is *per se* illegal under Section 1.

Two Dailies or One Daily—That Is the Realistic Choice

If, then, acquisition of a failing newspaper by an outside party is only a mere possibility, the alternative of a joint operating agreement, such as the one in this case and other similar ones in twenty-one other cities, achieves the economies and efficiency which enable the failing newspaper to remain in the market in effective competition in news and editorial views by consolidation of its commercial functions with those of the other successful newspaper. Absent the prospect of a complete merger by acquisition of the failing paper, the joint operating agreement avoids the otherwise inevitable consequence of a single daily newspaper community.

Natural Forces, Not TNI, Are Barriers to Entry of a Third Tucson Daily

The detailed analysis of Section 1 issues would make extended discussion of Section 2 Sherman Act questions for the most part repetitive.

The District Court, having ruled that the 1940 operating agreement was illegal *per se* laid the basis for its conclusion that appellants had combined and conspired by means of the agreement to acquire monopoly power over circulation and advertising rates and thus acquired monopoly power over the daily newspaper

business in Tucson in violation of Section 2 of the Sherman Act.

This is based on the same fallacious assumption, as in the Section 1 ruling, that the primary intent and purpose of the 1940 agreement was to eliminate all commercial competition between the Star and Citizen. We have spelled out at length in III, *supra,* that the main intent is the lawful one of preserving the journalistic functions of disseminating news and opinions from two editorially independent and competitive sources.

Moreover, classifying appellants' conduct as a combination and conspiracy, is an unwarranted attempt superficially to fit that type of antitrust offense into an irrelevant category. The partial merger through TNI thereafter made TNI the single enterprise or actor for management and performance of the commercial functions of the Star and Citizen. The subjective or specific intent was not to monopolize, an element of proof in a Section 2 offense. On the contrary, the specific intent of the 1940 agreement is to prevent the elimination of *all* daily newspaper competition in Tucson by demise of the failing Citizen. Since the antitrust laws are aimed ultimately at preserving consumer choices, and likewise the desired goal of a free press is to maintain diversity of ideas, which is the overriding public interest? An operating agreement which gives the consumer readers a choice between a morning and evening daily with their diversity of news reporting editorial views and features? Or a single daily with no choice at all with respect to a local daily newspaper? The questions themselves supply the answers.

The conclusion which ineluctably follows from the foregoing is that the formation of TNI in 1940, as a

partial merger or joint venture, was an inevitable result of the fact that the Tucson market was too limited —and still is too limited—profitably to support two daily newspapers in full commercial competition.

This underscores another fallacy in the Government's reasoning, namely, that the 1940 operating agreement confronts a prospective entrant with a unification of the commercial functions of the Star and Citizen and this forecloses entry of another daily newspaper.

As of 1968 only three cities in the United States have three daily papers of general content, and circulation with more than two ownerships, namely, Washington, D. C., New York City and Boston. Moreover, the Amicus has shown that today a population of more than 650,000 is the economic potential most likely to support two commercially competing metropolitan dailies. Tucson's population in excess of 200,000 is near the middle of the populations of the cities where operating agreements are now in existence. It is fictional to assume that Tucson, which cannot profitably sustain two commercially competing dailies, can possibly support three.

Noting here our position that the Section 1 order on relief should be reversed, the foregoing further supports the belief that the economies and cost savings resulting from the consolidation of commercial functions are essential to keep the Citizen from slipping back into a failing condition.

The general experience in the daily newspaper field, as well as the record in the instant case, bear out this conclusion. It will be of no ultimate avail that the Citizen may for a time be able to compete commercially with the Star, which would have the significant com-

petitive advantage of its Sunday edition. Before long intractable economic forces will recreate the very conditions that brought the Citizen to its knees in 1940. As shown below, as the Star's circulation exceeds substantially that of the Citizen, the high volume local retail advertising will be largely diverted to the Star and will spark off a downward spiral in circulation and advertising revenues of the Citizen.

"Monopoly Thrust Upon"

The single daily newspaper in a given city is generally labeled a "monopoly".

In popular usage, members of the public might refer to a sole local daily newspaper or the only local motion picture theatre as a "monopoly". In antitrust words of art, the "monopoly thrust upon" concept, first stated by Judge Learned Hand in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 at 430 (2nd Cir. 1940) and repeated in *United States* v. *United Shoe Machinery Co.,* 110 F. Supp. 295 at 342 (D. Mass. 1953), *aff'd* per curiam 347 U.S. 521 (1954), has been applied to a city which was found unable economically to support two commercially competing dailies—described by the court as a "natural monopoly market". *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 284 F. 2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961). See also *United States* v. *Harte-Hanks Newspapers, Inc.,* 170 F. Supp. 227 (N.D. Tex. 1939).[32]

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[32] A former head of the Antitrust Division, Donald F. Turner, is co-author of Kaysen and Turner, *Antitrust Policy* (1959). At p. 191 the authors noted conditions under which a natural monopoly may result in industrial markets and then state:

> "In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field to one firm; *in a*

In both cases, the court held there was no violation of Section 2 of the Sherman Act. These precedents squarely apply to Tucson and other cities with similar newspaper operating agreements, for without such arrangements the weaker paper would fail and the city would have only one daily newspaper, or possibly single ownership of a morning and evening daily. In either event, there would be no violation of Section 2 of the Sherman Act. But when there is resort to a partial merger of the commercial functions of the strong and failing paper, as in 1940 in Tucson, the community benefits from the preservation of news and editorial competition of each paper.

The Amicus, while recognizing the Section 2 antitrust usage of the monopoly concept, points out the use of "monopoly" as a catch-word has misleading

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meaningful sense, competition here is self-destructive." (Emphasis supplied.)

In a footnote on the same page the authors observed:

"There are disturbing indications that newspaper publishing is approaching this unhappy state in many cities and towns."

The empirical data in the Tables attached to this Brief show that "this unhappy state" has actually been reached in virtually all cities which have no commercially competing, separately owned daily newspapers.

The Citizen attempted to compete commercially with the Star prior to 1940 but that competition proved to be "self-destructive" to the Citizen and the 1940 operating agreement averted a natural "monopoly"—that is, a single newspaper city—for the Star.

The relief ordered by the District Court under Section 1, which would compel the Star and Citizen to separate their commercial operations—except printing and truck distribution—as we showed, will not permit the economies and efficiency essential to the continued profitability of the Citizen. The relief ordered by the District Court will therefore, after a short lapse of time, cause the Citizen to slip back into a failing condition.

connotations. A sole daily newspaper does not enjoy a "monopoly" of news media. The "one daily" monopoly newspaper city is fiction, not fact. There is no locality with a population sufficient to classify it as a city which does not have a readership in other printed media coming into the city. Nationally distributed magazines (Time, Newsweek, Life and Look, to name a few), daily newspapers from cities or suburban areas nearby, and weekly newspapers provide "a multitude of tongues". When radio and television stations are added to these multiple printed media, it is obvious that there is "a multitude of voices".

The same applies to radio and television as competing media. Professor Raymond B. Nixon has empirically shown[33] that " * * * while only 45 [cities in the United States] now have commercially competing local dailies, there are 1,298 daily cities with a total of 4,879 competing 'media voices'. * * * The emphasis is thus upon the number of separate owners in the field of local mass communication rather than upon the number of newspaper or broadcasting stations alone." (at 188-189)

Professor Nixon concludes:

> " * * * Obviously, intermedia competition has taken the place of inter-newspaper competition alone. Likewise, the spread of radio and television has slowed down the establishment of newspapers, both dailies and weeklies." (at 189)

Thus, the realistic conclusion is that neither the sole local daily newspaper nor the two joint arrangement newspapers has the power to exclude competition or to control the market, the requisite for a Section 2 violation.

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[33] 14 Gazette, No. 3, 181 (International Journal of the Science of the Press, Univ. of Amsterdam, Holland).

CONCLUSION

In light of the foregoing, we submit the Court should reverse the judgment of the District Court and direct the entry of a judgment in favor of the appellants herein, awarding judgment in their behalf. In making this statement, we point out that this case is one which under no juridical circumstances lends itself to summary judgment in behalf of the Government. Under the usual circumstances of antitrust litigation, we would request that the judgment below be vacated and a full scale trial on the merits be ordered.

In light, however, of the peculiar structural and behavioral aspects of the daily newspaper business as set forth herein and as coupled with facts already before this Court, we submit that a further trial is totally unnecessary and respectfully urge that the judgment below be vacated and judgment in behalf of the appellants be entered without further proceedings.

Respectfully submitted,

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APPENDIX I

Summary of Factual Differences From Instant Case and Holdings of This Court in Cases Cited by Government at Page 14, Footnotes 9 and 10 of Its Motion To Affirm.

A. Section 1, Sherman Act, Cases Cited in Footnote 9, at p. 14 of Government's Motion to Affirm.

United States v. *Trenton Potteries Co.*, 273 U.S. 392 (1927)—a classic case of an illegal combination by a trade association of competitors with the sole purpose of fixing the market price of bathroom fixtures (a criminal prosecution).

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)—an illegal combination and conspiracy among major oil companies to purchase surplus gasoline and thereby raise the tank car and retail prices of gasoline sold in the Mid-western market. The Court's opinion presents an elaborate market analysis and concludes the sole purpose and effect was to fix prices (a criminal prosecution).

United States v. *Line Material Co.*, 333 U.S. 287 (1948)—an illegal combination or conspiracy between patentees through cross-licensing agreements with sole purpose to fix prices of several products, and though multiple sublicensees accomplishing industry-wide price fixing—all beyond the lawful scope of the exclusive rights of the patents involved.

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951)—a classic case of an unlawful agreement or conspiracy among distillers to fix the maximum resale price.

Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1 (1958)—a network of coercive tying clauses held unreasonable *per se* under the Sherman Act, where there was sufficient economic power over the tying product appreciably to restrain competition in the market for

the tied product and a substantial amount of interstate commerce was affected.

United States v. *General Motors Corp.*, 384 U.S. 127 (1966)—characterized by Court as a classic conspiracy in restraint of trade, through joint and collusive action by three associations of Chevrolet dealers and General Motors, to eliminate sale of new Chevrolet automobiles through "discount houses" and "referral services."

United States v. *Sealy, Inc.*, 388 U.S. 350 (1967)—allocation of exclusive territories to licensees of the Sealy trademark held to be the product of a horizontal arrangement and part of an aggregate of trade restraints, including price fixing and policing action of Sealy, the latter being controlled by licensee competitors. Hence, the conduct was not ancillary to a lawful program of trademark licensing.

B. Section 1, Sherman Act. Cases Cited by Government in Footnote 10, at p. 14, of Government Motion to Affirm.

United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899)—a classic case of an agreement among competitors with main purpose to divide markets as an adjunct to price fixing.

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951)—a classic international cartel involving a combination and conspiracy by American Timken and two foreign affiliated Timken companies to divide world markets in antifriction bearings to fix prices and to restrict imports to, and exports from, the United States in such bearings. Those naked restraints were not justified as reasonably ancillary to the "Timken" trademark.

United States v. *Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945)—dicta not applicable to facts of instant case.

APPENDIX II

TABLE A

Trends in Ownership of English-Language Dailies of General Circulation and Content in the United States, 1880-1968*

	1880	1909-10	1920	1930	1940	1945	1961	1968
Circulation (thousands)	3,093	22,426	27,791	39,589	41,132	45,955	58,080	61,561
Total Dailies	850	2,202	2,042	1,942	1,878	1,744	1,763	1,749
Total Daily Cities	389	1,207	1,295	1,402	1,426	1,396	1,461	1,500
One-Daily Cities	149	509	716	1,002	1,092	1,107	1,222	1,284
% of Total	38.3	42.2	55.3	71.5	76.6	79.3	83.6	85.6
One-Combination Cities	1	9	27	112	149	161	160	150**
Joint-Operation Cities					4	11	18	22***
Total, Lines A, B, C	150	518	743	1,114	1,245	1,279	1,400	1,455
% of Total	38.6	42.9	57.4	79.4	87.3	91.6	95.8	97.0
Cities with Two or More Commercially Competing Dailies	239	689	552	288	181	117	61	45

* SOURCES: Figures from 1945 to 1968 from *Editor & Publisher International Year Book* for years covered, with only minor corrections. Sources for earlier years are given in Raymond B. Nixon, "Trends in Daily Newspaper Ownership since 1945," *Journalism Quarterly*, 31:7 (Winter 1954).

** Each of the 150 combinations consists of a morning and an evening paper under single-ownership except for two small Indiana cities, where a single owner publishes two evening papers, one Democratic and one Republican.

*** Each of these 21 joint operations consists of a morning and an evening paper in the same city. There also is a joint operation between dailies in Franklin and Oil City, Pa.

APPENDIX II

TABLE B

Classification of Cities With Commercially Competing Dailies by Population Groups, 1945 and 1968*

(All cities classified by population according to 1940 and 1960 Census)

(Key: sd = single daily; so = 2 dailies, single owner; jo = 2 dailies, joint operation)

10,000 and Under

1945 (117 cities) (14)	1968 (45 cities) (3)
Hope, Ark.— 7,475—now sd	Franklin, Ind.— 9,453—new daily, 1963
Chico, Calif.— 9,287—now sd	Maysville, Ky.— 8,484
Colusa, Calif.— 2,285—now sd	Murray, Ky.— 9,303—new daily, 1947
Marion, Ill.— 9,251—now sd	
Alexandria, Ind.— 4,801—now sd	
Princeton, Ind.— 7,786—now sd	
Washington, Ind.— 9,312—now sd	
Hazard, Ky.— 7,397—now semi-wkly	
Maysville, Ky.—6,572	
McComb, Miss.—9,828—now sd	
Tupelo, Miss.—8,127—now sd	
Lamar, Mo.—2,992—now sd	
Las Vegas, Nev.—8,422	
Kenton, Ohio—7,593—now sd	

* Sources: For 1945, *Editor & Publisher Year Book* for 1945, with corrections from ANPA records to March 1, 1945; for 1968, *Editor & Publisher Year Book* for 1968, with corrections from ANPA records to Feb. 1, 1968.

1945	1968
10,001 - 25,000	
(22)	(4)
Richmond, Calif.—23,642—now sd	Charleston, Ill.—10,506—new daily, 1966
Trinidad, Colo.—13,223—now sd	Huntington, Ind.—16,185
Twin Falls, Idaho—11,851—now all-day	McAlester, Okla.—17,419—new daily, 1967
Champaign-Urbana, Ill.—14,064	Morristown, Tenn.—21,267—new daily, 1966
Huntington, Ind.—13,903—now sd	
Logansport, Ind.—20,177 now sd	
Iowa City, Iowa—17,182	
Columbia, Mo.—18,399	
Independence, Mo.—16,066—now sd	
St. Charles, Mo.—10,803—now sd	
Beatrice, Neb.—10,883—now sd	
North Platte, Neb.—12,429—now sd	
Roswell, N. Mex.—13,482—now sd	
Hudson, N.Y.—11,517—now sd	
Statesville, N.C.—11,440—now sd	
Ironton, Ohio—15,851—now sd	
Lawton, Okla.—18,055—now so	
Pottsville, Pa.—24,530—now sd	
Greenville, Tex.—13,995—now sd	
Bremerton, Wash.—15,134—now sd	
Vancouver, Wash.—18,788—now sd	
Moundsville, W.Va.—14,168—now sd	

1945	1968
25,001 - 50,000	
(15)	(6)
Wilmington, Calif.—30,000—no daily, 1967	Anchorage, Alaska—44,237—new daily, 1948
San Bernardino, Calif.—43,646—now so	Fremont, Calif.—43,790—new daily, 1966
Meriden, Conn.—39,494—now so	Bloomington, Ind.—31,357—new daily, 1966
Norwalk, Conn.—39,849—now sd	Iowa City, Iowa—33,443
Belleville, Ill.—28,405—now sd	Columbia, Mo.—36,650
Anderson, Ind.—41,572—now sd	Oshkosh, Wis.—45,110—new daily, 1967
Muncie, Ind.—49,720—now so	
Bangor, Me.—29,822—now sd	
Kingston, N.Y.—28,589—now sd	
Raleigh, N.C.—46,897—now so	
Wilmington, N.C.—33,407—now so	
Zanesville, Ohio—37,500—now sd	
Salem, Ore.—30,903—now so	
Newport, R.I.—30,532—now sd	
Burlington, Vt.—27,686—now sd	

1945	1968
50,001 - 100,000	
(15)	(6)
Little Rock, Ark.—88,039	Colorado Springs, Colo.—70,194—new daily, 1947
Waterbury, Conn.—99,314—now sd	Champaign-Urbana, Ill.—76,877 (cities listed separately in 1945)
St. Petersburg, Fla.—60,812—now so	Las Vegas, Nev.—64,405
Augusta, Ga.—65,919—now so	Binghamton, N.Y.—75,941
Shreveport, La.—98,167—now jo	Schenectady, N.Y.—81,682
Lynn, Mass.—98,123—now sd	York, Pa.—54,504
Atlantic City, N.J.—64,094—now sd	
Binghamton, N.Y.—78,309	
Schenectady, N.Y.—87,549	
Altoona, Pa.—80,214—now sd	
Harrisburg, Pa.—83,893—now so	
York, Pa.—56,712	
Amarillo, Tex.—51,686—now so	
Corpus Christi, Tex.—57,301—now so	
Charleston, W.V.—67,914—now jo	

1945	1968
100,001 - 200,000	
(20)	(7)
Sacramento, Calif.—105,958	Little Rock, Ark.—165,845
Long Beach, Calif.—164,271—now so	Sacramento, Calif.—191,667
Hartford, Conn.—166,267	Hartford, Conn.—162,178
New Haven, Conn.—160,605—now so	Paterson, N.J.—143,663
Jacksonville, Fla.—173,065—now so	Trenton, N.J.—114,667—new daily, 1946
Miami, Fla.—172,065—now jo	Scranton, Pa.—114,443
Tampa, Fla.—108,958—now so	Chattanooga, Tenn.—130,009—jo dissolved, 1966
Fort Wayne, Ind.—118,410—now jo	
Wichita, Kans.—114,966—now so	
Grand Rapids, Mich.—164,292—now sd	
Paterson, N.J.—139,656	
Albany, N.Y.—130,577—now so	
Yonkers, N.Y.—142,598—now sd	
Charlotte, N.C.—100,899—now so	
Erie, Pa.—116,955—now so	
Scranton, Pa.—140,404	
Knoxville, Tenn.—111,580—now jo	
Fort Worth, Tex.—177,662	
Salt Lake City, Utah—149,934—now jo	
Tacoma, Wash.—109,408—now so	

1945		1968
	200,001 - 300,000	
(6)		(0)
Birmingham, Ala.— 267,583—now jo		
San Diego, Calif.— 203,341—now so		
Hempstead Town, N.Y.— 278,804—now sd		
Dayton, Ohio—210,718—now so		
Dallas, Tex.—294,734		
San Antonio, Tex.—253,854		
	300,001 - 400,000	
(8)		(2)
Oakland, Calif.— 302,163—now sd		Oklahoma City, Okla.— 324,253
Denver, Colo.— 322,412		Fort Worth, Tex.— 356,268
Atlanta, Ga.— 302,288—now so		
Indianapolis, Ind.— 386,972—now so		
Columbus, Ohio—306,087—now jo		
Portland, Ore.—305,394—now so		
Houston, Tex.—384,514		
Seattle, Wash.—368,302		
(3)	400,001 - 500,000	(2)
New Orleans, La.— 494,537—now so		Denver, Colo.—493,887
Newark, N.J.—429,760		Newark, N.J.—405,220
Cincinnati, Ohio—455,610		

1945		1968
(9)	500,001 - 1,000,000	(10)
San Francisco, Calif.—634,536—now jo		Washington, D.C.—763,956
Washington, D.C.—663,091		Baltimore, Md.—939,024
Baltimore, Md.—859,100		Boston, Mass.—697,197
Boston, Mass.—770,816		Buffalo, N.Y.—532,759
St. Louis, Mo.—816,048—now jo		Cincinnati, Ohio—502,550
Buffalo, N.Y.—575,901		Cleveland, Ohio—876,050
Pittsburgh, Pa.—671,659—now jo		Dallas, Tex.—679,684
Cleveland, Ohio—878,336		Houston, Tex.—938,219
Milwaukee, Wis.—857,472—now so		San Antonio, Tex.—587,718
		Seattle, Wash.—557,087
(5)	More than 1,000,000	(5)
Los Angeles, Calif.—1,504,277		Los Angeles, Calif.—2,479,015
Chicago, Ill.—3,396,808		Chicago, Ill.—3,550,404
Detroit, Mich.—1,623,452		Detroit, Mich.—1,670,144
N.Y. City, N.Y.—7,454,995		N.Y. City, N.Y.—7,781,984
Philadelphia, Pa.—1,931,334		Philadelphia, Pa.—2,002,512

APPENDIX II

TABLE C

New Dailies of General Content and Circulation (Paid) Started In Cities of 100,000 or More, 1930-1967*

(* Indicates dailies still being published; specialized dailies are listed only if they are included in *Editor & Publisher Year Book;* papers operated only during strike periods are not included)

1930	
Newark, N.J. (442,337)	*Free Press*—suspended, 1931
1931	
Detroit, Mich. (1,568,662)	*Mirror*—suspended, 1932
Philadelphia, Pa. (1,950,961)	*Star*—suspended, 1934
1932	
*Chicago, Ill. (3,376,438)	*Calumet* (neighborhood paper)
Yonkers, N.Y. (134,646)	*Record*—merged, 1950
El Paso, Tex. (102,421)	*World-News*—suspended, 1936
1933	
Memphis, Tenn. (253,143)	*News*—suspended, 1933
1934	
*New York, N.Y. (6,930,446)	*Morning Telegraph* (sports and commercial)
1935	
None	
1936	
None	
1937	
None	

* Source: Editor & Publisher International Year Book, 1930-1968, and records of American Newspaper Publishers Association. Cities are classified by population according to Federal Census at beginning of decade.

1938	
Des Moines, Ia. (142,559)	*Dispatch*—suspended, 1938
Rochester, N.Y. (328,132)	*News*—suspended, 1939
Nashville, Tenn. (153,866)	*Times*—suspended, 1940
1939	
Oklahoma City, Okla. (185,389)	*Daily Herald*—suspended, 1939
Milwaukee, Wisc. (578,249)	*Post*—suspended, 1942
1940	
Hartford, Conn. (166,267)	*Newsdaily*—suspended, 1940
•Hempstead, L.I. (20,856) (suburb of N.Y.)	*Newsday* (now serves county of more than 1,000,000 pop.)
New York, N.Y. (7,454,955)	*PM* (adless daily; changed in 1948 to *Star*, suspended in 1949)
Chattanooga, Tenn. (128,163)	*Evening Times*—suspended, 1942
1941	
•Chicago, Ill. (3,396,808)	*Sun* (merged with Times, 1947)
1942	
Atlanta, Ga. (302,288)	*Post*—suspended, 1942
1943	
None	
1944	
•Long Beach, Calif. (164,271) (suburb of Los Angeles)	*Independent*
San Diego, Calif. (203,341)	*Journal*—suspended, 1950
1945	
None	
1946	
•Trenton, N.J. (124,697)	*Trentonian* (tabloid)
Erie, Pa. (116,955)	*Sun*—merged, 1946
1947	
None	

	1948
Los Angeles, Calif. (1,504,277)	*Mirror*—suspended, 1962
	1949
New York, N.Y. (7,454,955)	*Compass*—suspended, 1952
	1950
Kansas City, Mo. (456,622)	*Sun Herald*—suspended, 1950
*Brooklyn, N.Y. (2,738,175)	*Daily* (neighborhood paper in borough of New York City)
	1951
Allentown, Pa. (108,347)	*News-Digest*—suspended, 1954
	1952
Kansas City, Mo. (475,539)	*News Press*—changed back to weekly, 1958
	1953
Atlanta, Ga. (487,455)	*North Side News*—changed to weekly, 1954
	1954
Montgomery, Ala. (134,393)	*Examiner*—suspended, 1955
	1955
Jackson, Miss. (144,422)	*State Times*—suspended, 1962
	1956
Portsmouth, Va. (114,773)	*Times*—suspended, 1957
	1957
None	
	1958
None	
	1959
*Santa Ana, Calif. (45,533)	*Register*
	1960
None	

1961

Portland, Ore. (372,676)	*Reporter*—suspended, 1964

1962

Phoenix, Ariz. (439,170)	*Arizona Journal*—suspended, 1964
Minneapolis, Minn. (482,872)	*Herald*—suspended, 1962

1963

Phoenix, Ariz. (439,170)	*American*—changed to weekly only, 1965
Phoenix, Ariz. (439,170)	*Arizona Journal* (started second time; suspended, 1963)

1964

Phoenix, Ariz. (439,170)	*Arizona News*—suspended, 1965
•Oklahoma City (324,253)	*Oklahoma City Journal*

1965

Minneapolis, Minn. (482,872)	*American*—suspended, 1965

1966

Tucson, Ariz. (212,892)	*American*—suspended, 1967
•Deer Park, N.Y. (16,726) (suburb of N.Y.)	*Suffolk Sun* (serves county of more than 1,000,000 pop.)
•Chattanooga, Tenn. (130,009)	*Post* (evening paper started by morning *Times* following dissolution of its joint operating agreement with evening *News-Free Press*)

1967

•Minneapolis, Minn. (482,872)	*American* (started second time but not yet of sufficient scope to be regarded as a daily of "general content and circulation")
•Oshkosh, Wis. (45,110)	*The Paper*

APPENDIX II

TABLE D

U.S. Dailies of General Circulation Suspended, Merged, or Gone Weekly, 1930-1967

(in cities of 100,000 or more)

1930	
Detroit, Mich.	*Daily*
Paterson, N.J.	*Press Guardian*
Canton, Ohio	*News*
Providence, R.I.	*News & Tribune*
1931	
Birmingham, Ala.	*Independent*
Elizabeth, N.J.	*Times Herald*
Newark, N.J.	*Free Press*
New York, N.Y.	*World & Telegram*
Cincinnati, Ohio	*Commercial Tribune*
Portland, Ore.	*News & Telegram*
El Paso, Tex.	*Post & Herald*
Spokane, Wash.	*Times*
1932	
Los Angeles, Calif.	*Express & Herald*
New Haven, Conn.	*Times*
Chicago, Ill.	*News & Post*
New Bedford, Mass.	*Standard & Times*
Detroit, Mich.	*Mirror*
St. Louis, Mo.	*Star & Times*
Brooklyn, N.Y.	*Times & Standard Union*
New York, N.Y.	*Graphic*
Yonkers, N.Y.	*Herald & Statesman*
Scranton, Pa.	*Sun*
Knoxville, Tenn.	*Times*
Milwaukee, Wisc.	*Herald*

	1933
Birmingham, Ala.	*Mirror*
Washington, D.C.	*U.S. Daily*
Cambridge, Mass.	*Journal*
Cincinnati, Ohio	*Sentinel*
Memphis, Tenn.	*Evening Appeal & Commercial Appeal*
	1934
Philadelphia, Pa.	*Star*
	1935
Louisville, Ky.	*News & Enquirer*
	1936
Los Angeles, Calif.	*Press*
Youngstown, Ohio	*Vindicator & Telegram*
Oklahoma City, Okla.	*Beacon*
El Paso, Tex.	*Democrat*
	1937
Evansville, Ind.	*Journal*
Omaha, Neb.	*Bee News*
Trenton, N.J.	*Press*
Albany, N.Y.	*Knickerbocker Press & News*
Brooklyn, N.Y.	*Standard Union & Times*
New York, N.Y.	*Journal & American*
Rochester, N.Y.	*Journal & American*
Dayton, Ohio	*Gross Daytoner Zeitung*
Tacoma, Wash.	*Ledger*
	1938
Miami, Fla.	*Herald & Tribune*
South Bend, Ind.	*News-Times*
Worcester, Mass.	*Telegram*
St. Paul, Minn.	*News*
Akron, Ohio	*Times Press*
Providence, R.I.	*Star Tribune*
Dallas, Tex.	*Journal & Dispatch*

1939

San Diego, Calif.	*Sun*
Washington, D.C.	*Capital Daily*
Atlanta, Ga.	*Georgian-American*
Chicago, Ill.	*Herald-Examiner*
Chicago, Ill.	*Midwest Daily Record*
Boston, Mass.	*News Bureau*
Minneapolis, Minn.	*Journal & Star*
Kansas City, Mo.	*Democrat*
Newark, N.J.	*Star-Eagle*
Buffalo, N.Y.	*Times*
Rochester, N.Y.	*Evening News*
Syracuse, N.Y.	*Journal*
Oklahoma City, Okla.	*News*
Portland, Ore.	*News Telegram*
Chattanooga, Tenn.	*News*
Spokane, Wash.	*Press*
Milwaukee, Wisc.	*News & Sentinel*

1940

San Francisco, Calif.	*Mission Daily Times*
Hartford, Conn.	*Newsdaily*
Chattanooga, Tenn.	*Tribune*
Memphis, Tenn.	*Democrat*
Nashville, Tenn.	*Times*

1941

Bridgeport, Conn.	*Times-Star*
New Orleans, La.	*Tribune* with *Item*
Boston, Mass.	*Transcript*

1942

Atlanta, Ga.	*Post*
New Bedford, Mass.	*Mercury*
Kansas City, Mo.	*Journal*
Trenton, N.J.	*State Gazette*
Philadelphia, Pa.	*Public Ledger*
Chattanooga, Tenn.	*Times* (Evening Paper)
Dallas, Tex.	*Journal*
Milwaukee, Wisc.	*Post*

	1943
None	
	1944
None	
	1945
Long Beach, Calif.	*Sun* with *Press-Telegram*
	1946
Erie, Pa.	*Sun*
Philadelphia, Pa.	*Northeast Times*
	1947
Washington, D.C.	*United States Journal*
Springfield, Mass.	*Republican* (Morning paper suspended)
Springfield, Mass.	*Union* (Evening paper suspended)
Brooklyn, N.Y.	*Citizen*
Philadelphia, Pa.	*Record*
Seattle, Wash.	*Star*
	1948
Chicago, Ill.	*Sun & Times* (merged into *Sun-Times*)
Minneapolis, Minn.	*Times*
Bronx, N.Y.	*Home News & New York Post*
	1949
Camden, N.J.	*Post*
New York, N.Y.	*Star*
Dayton, Ohio	*Journal & Herald*
Tacoma, Wash.	*Times*
	1950
Birmingham, Ala.	*Age-Herald*
San Diego, Calif.	*Journal*
New York, N.Y.	*Sun*
Kansas City, Mo.	*Sun-Herald*
	1951
St. Louis, Mo.	*Star-Times*

	1952
New York, N.Y.	*Compass*
Salt Lake City, Utah	*Telegram*
	1953
None	
	1954
Los Angeles, Calif.	*Daily News*
Washington, D.C.	*Times Herald*
Atlanta, Ga.	*North Side News*
South St. Paul, Minn.	*Reporter*
Allentown, Pa.	*News-Digest*
Baton Rouge, La.	*Journal*
Rumford, Me.	*Times*
	1955
Portsmouth, Va.	*Star*
Montgomery, Ala.	*Examiner*
	1956
Boston, Mass.	*Post*
	1957
Portsmouth, Va.	*Times*
	1958
New Orleans, La.	*Item* (Eve) & *States* (Eve)
Cincinnati, Ohio	*Times-Star & Post*
	1959
San Francisco, Calif.	*Call-Bulletin & San Francisco News*
Grand Rapids, Mich.	*Herald*
Columbus, Ohio	*Citizen & State Journal*
	1960
Wichita, Kans.	*Beacon* with *Wichita Eagle*
Detroit, Mich.	*Times*
Cleveland, Ohio	*News* with *Cleveland Press*
Pittsburgh, Pa.	*Sun-Telegraph* with *Pittsburgh Post-Gazette*

1961	
Boston, Mass.	*Record* with *American*
1962	
Los Angeles, Calif.	*Examiner*
Los Angeles, Calif.	*Mirror* with *Los Angeles Times*
Minneapolis, Minn.	*Herald*
Jackson, Miss.	*State Times*
1963	
Phoenix, Ariz.	*Arizona Journal*
Brooklyn, N.Y.	*Eagle*
New York, N.Y.	*Mirror*
1964	
Phoenix, Ariz.	*Arizona Journal* (started and suspended second time)
Portland, Ore.	*Reporter*
Houston, Tex.	*Press*
1965	
Phoenix, Ariz.	*American*
Phoenix, Ariz.	*Arizona News*
San Francisco, Calif.	*News Call Bulletin* with *San Francisco Examiner*
Atlanta, Ga.	*Times*
Indianapolis, Ind.	*Times*
Minneapolis, Minn.	*American*
1966	
New York, N.Y.	*Herald-Tribune, Journal American & World-Telegram*
1967	
Boston, Mass.	*Traveler* with *Boston Herald*
New York, N.Y.	*World Journal Tribune*
Tucson, Ariz.	*American*